92-1428

No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

CHICAGO AND NORTH WESTERN TRANSPORTATION COMPANY,

Petitioner,

v.

TRACY TEMPLETON,

Respondent.

Petition for Writ of Certiorari to the Supreme Court of Illinois

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This case is brought under the Federal Employers' Liability Act ("FELA"), 45 U.S.C. §51 *et seq.*, by a railroad employee who sought to recover for injuries he sustained when he fell from a railroad bridge on which he was working. At trial, the jury was instructed that it could find the railroad employer negligent for violating a regulation promulgated by the Occupational Safety & Health Administration ("OSHA"), despite the fact that Federal Courts of Appeal had previously held that a preemptive declaration published by the Federal Railroad Administration ("FRA") in 1978 specifically foreclosed the railroad job site from OSHA regulation. The Appellate Court of Illinois reasoned that federal law was controlling and unanimously held that the OSHA instruction constituted reversible error.

The divided Supreme Court of Illinois reversed the appellate court and affirmed the trial court. The state high court determined to ignore all applicable federal precedent. Instead, the court based its independent decision on a non-binding, retrospective interpretation of the FRA's 1978 declaration which was published by the FRA in 1991, over seven years *after* the accident at issue and over one year *after* the trial had been completed.

The questions presented are as follows:

1. Whether state courts may ignore a settled body of contrary federal law and explicitly stated national transportation policy and apply OSHA regulations on a piecemeal, *ad hoc* basis to railroad job sites previously declared to be within the FRA's exclusive regulatory jurisdiction?

2. Whether settled federal decisional law and express Congressional policy clearly delineating the FRA's exclusive

regulatory jurisdiction over specified railroad job sites may be obviated by a non-binding, agency disclaimer of jurisdiction, when the disclaimer is in conflict with the FRA's own prior pronouncements, and is issued *thirteen years after* the document it purports to interpret?

3. Whether state courts may ignore federal decisional law in determining what constitutes negligence under the FELA and create employer liability under the Act by imposing their own independent concepts of negligence?

4. Whether, as a matter of constitutional due process of law, a settled interpretation of a federal regulation may be overturned after trial and a new interpretation retroactively applied to affirm a finding of employer negligence under the FELA and a $3.5 million damage award?

LIST OF PARTIES AND RULE 28.1 LIST

The parties to the proceedings below are petitioner Chicago and North Western Transportation Company and respondent, Tracy Templeton, who is the plaintiff in a personal injury action brought against petitioner under the Federal Employers' Liability Act, 45 U.S.C. §51 *et seq.*

Petitioner Chicago and North Western Transportation Company is a wholly-owned subsidiary of Chicago and North Western Holdings Corp. Petitioner's subsidiaries and affiliates are:

Iowa Transfer Railway Company
Kansas City Terminal Railway Company
MT Properties, Inc.
Midwestern Railroad Properties, Inc.
North Western Leasing Company
Peoria and Pekin Union Railway Company
TTX Company
Transportation Data Exchange, Inc.
Western Railroad Properties, Inc.
Wisconsin Town Lot Company

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Petition For Writ of Certiorari to the Supreme Court of Illinois

PETITION FOR A WRIT OF CERTIORARI

Petitioner, Chicago and North Western Transportation Company ("North Western"), respectfully requests that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of Illinois entered in the above entitled proceeding.

OPINIONS BELOW

The divided opinion of the Supreme Court of Illinois is reported at 151 Ill.2d 325, 603 N.E.2d 441 (1992). It is reprinted in the separate appendix at Appendix A (p. A1).[1/] Its order denying a rehearing is unreported and is attached hereto as Appendix B (p. A21). The opinion of the Appellate Court of Illinois, First District, is reported at 211 Ill.App.3d 489, 570 N.E.2d 467 (1991). It is reprinted at Appendix C (p. A22).

[1/] Due to its length, the Appendix is printed as a separate document, per Rule 14(h). Page numbers in parentheses preceded by "A" refer to Appendix pages.

The trial court's order entering judgment against North Western on a jury's verdict is not reported, nor is that court's order denying North Western's post-trial motions, but both orders are reprinted at Appendices D and E (pp. A33-35).

JURISDICTION

The divided opinion of the Supreme Court of Illinois (p. A1) was entered on July 30, 1992. A timely petition for rehearing was denied on November 30, 1992. (p. A21). The jurisdiction of this Court is invoked under 28 U.S.C. §1257(a) and Rule 10.1(b) and (c) of this Court.

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED[2/]

Constitutional Provisions Involved:

Article VI(2), United States Constitution
Amendment 14, United States Constitution

Federal Statutes Involved:

Federal Employers' Liability Act, 45 U.S.C. §51 *et seq.* (1908)
Federal Railroad Safety Act, 45 U.S.C. §421 *et seq.* (1970)
Rail Safety Improvement Act of 1988, 45 U.S.C. §431(e) *et seq.* (1988)
Occupational Safety and Health Act, 29 U.S.C. §651 *et seq.* (1970)

Federal Regulations Involved:

29 C.F.R. §§1926.104-1926.105
41 Fed.Reg. 50302-03 (1976)
42 Fed.Reg. 22184-85 (1977)
43 Fed.Reg. 10583-90 (1978)
56 Fed.Reg. 3434-41 (1991)

[2/] The relevant constitutional and statutory provisions are set forth verbatim in the separate appendix at Appendix F (p. A36), while relevant excerpts from the lengthy federal regulations involved may be found in Appendices G through K (pp. A41-73).

STATEMENT OF THE CASE

North Western is a Chicago-based railroad which owns track, roadbed and associated structures throughout the midwestern United States. As a member of the railroad industry, it is subject to a broad array of federal statutes pertaining to employee health and safety, including the Federal Employers' Liability Act ("FELA"), 45 U.S.C. §51 *et seq.* (1908); the Federal Railroad Safety Act, 45 U.S.C. §421 *et seq.* (1970); and the Occupational Safety and Health Act ("OSH Act"), 29 U.S.C. §651, *et seq.* (1970).

In 1985, North Western was sued under the FELA by Tracy Templeton, one of its employees. Although the FELA is a federal cause of action, state courts are awarded concurrent jurisdiction under the Act. 45 U.S.C. §56. Templeton elected to file his suit in the Circuit Court of Cook County, Illinois.

Templeton sustained personal injuries on January 27, 1984, while working on a railroad bridge at South Pekin, Illinois. His injury occurred when he fell through a temporary opening in the bridge deck. Templeton was not wearing any type of safety belt or restraining device. North Western's bridge safety rules did not require that an employee utilize a safety belt in all facets of bridge work. Safety belts were available, but North Western allowed its employees to utilize the belts at their own discretion.

A. Trial Court Proceedings

In order to fault North Western and to minimize his own contributory negligence, plaintiff sought to introduce evidence at trial that North Western's bridge project was conducted in alleged violation of regulations promulgated by the Occupational Safety and Health Administration ("OSHA"). In particular, plaintiff contended that North Western violated OSHA construction

regulations by failing to require plaintiff to use a safety belt at all times, and by failing to secure a safety catch net under the bridge.[3/]

North Western resisted plaintiff's effort to label it as a federal law violator before the jury. In a pretrial motion *in limine* supported by a memorandum of law, North Western argued that the railroad's bridge workers were not subject to OSHA's construction regulations, and that it would constitute grievous error to admit evidence suggesting that North Western violated OSHA's regulations. North Western contended that the regulation of safe working conditions on railroad bridges was within the exclusive jurisdiction of the Federal Railroad Administration ("FRA"), pursuant to the authority vested in the Secretary of Transportation by the Federal Railroad Safety Act ("FRSA"). 45 U.S.C. §431. (See, p. A37).

North Western urged the trial court to consider that significant distinctions existed in the enabling legislation under which OSHA and the FRA operated. Although OSHA was authorized to prescribe and enforce health and safety regulations generally affecting American industry, the OSH Act itself declared that "Nothing in this chapter...shall apply to working conditions of employees with respect to which other federal agencies...exercise statutory authority to prescribe or enforce standards or regulations affecting occupational safety or health." 29 U.S.C. §653(b)(1). (See, pp. A37-38). North Western contended that the FRA was just such a federal agency. Pursuant to the FRSA, the FRA was authorized to "prescribe, as necessary, appropriate rules, regula-

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[3/] The specific OSHA regulations, at issue, 29 C.F.R. §§1926.104 and 1926.105, are reproduced at Appendix G (pp. A39-40).

tions, orders and standards for *all* areas of railroad safety..." 45 U.S.C. §431 (emphasis added). (See, p. A37).

North Western cited the trial court to federal decisional law which had defined the competing jurisdictions of the two federal agencies. Those cases instructed that the more generic, industry-wide regulations promulgated by OSHA were rendered inapplicable to the railroad industry whenever the FRA exercised its primary statutory jurisdiction by articulating a position (i) that its own regulations and no others should apply to certain working conditions within the railroad industry or (ii) that certain working conditions within the industry should go unregulated. *Velasquez v. Southern Pacific Transp. Co.*, 734 F.2d 216 (5th Cir. 1984); *Southern Pacific Transp. Co. v. Usery*, 539 F.2d 386, 391 (5th Cir. 1976), *cert. denied*, 434 U.S. 874 (1977). *Southern Ry. v. Occupational Saf. & H. Rev. Comm'n.*, 539 F.2d 335, 339 (4th Cir. 1976), *cert. denied*, 429 U.S. 999 (1976).

North Western also cited the trial court to an FRA Policy Statement which was issued on March 14, 1978, for the specific purpose of assisting "the courts and the Occupational Safety and Health Review Commission in understanding the extent to which FRA *has exercised* its statutory jurisdiction." 43 Fed.Reg. 10585 (p. A45) (emphasis added).[4/] In the Policy Statement, the FRA acknowledged that both "OSHA and FRA seek to assure workplaces are as safe as possible..." but that "within the area of railroad operations, it is FRA which must decide what regulations are necessary and feasible." 43 Fed.Reg. 10586 (p. A47). To that end, FRA declared its exclusive jurisdiction over the "safety

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[4/] Relevant excerpts from the 1978 FRA Policy Statement are reprinted at Appendix H (pp. A41-59).

of railroad operations" which it generally divided into three fields: "(1) Track, roadbed and associated devices and structures, (2) equipment, and (3) human factors." 43 Fed.Reg. 10586 (p. A48).

While the FRA Policy Statement affirmed that the FRA, itself, might undertake "additional regulatory initiatives" in the three regulatory fields "as may be necessary," its declaration that OSHA's regulations should not apply was unconditional. The Policy Statement explicitly pronounced that "piecemeal regulation of individual hazards *in any* of the three regulatory fields *by any other* agency of government would be disruptive and contrary to the public interest." 43 Fed.Reg. 10586 (p. A48) (emphasis added).

Not only did the Policy Statement explicitly state that health and safety issues pertaining to "track, roadbed and associated devices and structures" were reserved for the FRA's exclusive jurisdiction, but the Statement also specifically addressed railroad bridges in illustrating FRA's intentions. The FRA stated that *"OSHA regulations would not apply to...railroad bridges*, turntables, and similar structures or to walkways, beside the tracks in yards or along the right-of-way" because "these are *areas which are so much a part of the operating environment that they must be regulated by the agency with primary responsibility for railroad safety.*" 43 Fed.Reg. 10587 (pp. A54-55) (emphasis added).

The FRA declared that the proper protection of employees in such operating areas was "an integrated undertaking." The agency reasoned that, as a general rule, in such areas, "it is not possible to regulate an individual hazard without impacting on other, related working conditions...." Therefore, the FRA

pronounced that it was essential to national transportation policy "that the safety of railroad operations be the responsibility of a single agency...." 43 Fed.Reg. 10585 (p. A47).

Finally, North Western cited the trial court to FELA precedent from the United States Court of Appeals, Fifth Circuit, which involved an employee's fall from a railroad bridge under circumstances all but identical to the case at bar. *Velasquez v. Southern Transp. Co.*, 734 F.2d 216 (5th Cir. 1984). *Velasquez* held that OSHA's regulations were preempted from applying to railroad bridges by the FRA's 1978 Policy Statement. Moreover, *Velasquez* held that the issuance of jury instructions directing a jury that they might find railroad negligence based upon an alleged violation of OSHA's regulations would constitute reversible error. *Velasquez*, 734 F.2d at 218-19.

Nonetheless, North Western's motion *in limine* was denied. Plaintiff was permitted to introduce evidence of the OSHA regulations and to call an "expert witness" to testify that the OSHA regulations were violated by North Western. Furthermore, the trial court determined to ignore *Velasquez v. Southern Transp. Co., supra*. Over North Western's objections, the court instructed the jury that it could find North Western negligent for violating the OSHA catch net regulation.[5/]

So instructed, the jury returned a verdict for plaintiff in the sum of $3.5 million, after finding that plaintiff's contributory negligence constituted only 14% of the total fault for his accident. The trial court entered judgment on the jury's award (p. A33). The court also denied North Western's post-trial motions which,

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[5/] The instruction is set out at Appendix L (p. A74).

inter alia, complained of the court's adverse OSHA rulings and other alleged errors. (See p. A35).

B. Proceedings Before the Appellate Court of Illinois

On appeal, the Appellate Court of Illinois, First District, unanimously reversed the trial court and remanded the case for a new trial. That opinion is cited at 211 Ill.App.3d 489 and 570 N.E.2d 467. (See, pp. A22-32). The appellate court focused solely on the FRA preemption issue. The court reasoned that the FRA had primary regulatory authority over the railroad industry, and that the FRA's 1978 Policy Statement effectively established the FRA's exclusive jurisdiction within the areas of railroad operations, to include "railroad bridges." Thus, the court concluded that the authority of the Secretary of Labor in that area was foreclosed. (See, pp. A28-29).

The appellate court also noted that Congress had acquiesced in the FRA's assertion of exclusive jurisdiction over the hazards of working on railroad bridges, even though the FRA had not initiated any subsequent regulatory initiatives addressing bridge worker fall protection. (p. A28). Specifically, in 1988, long after publication of the 1978 Policy Statement, Congress passed the Rail Safety Improvement Act of 1988. Therein, Congress charged the Secretary of Transportation and the FRA with the sole responsibility of determining what, *if any*, safety equipment regulations should be developed for railroad bridge work:

> The Secretary shall within one year after June 22, 1988, issue such rules, regulations, orders and standards *as may be necessary* for the safety of maintenance of way employees, including standards for bridge safety equipment, such as nets, walkways, handrails, and safety lines, and requirements relating to instances when boats shall be used.

45 U.S.C. §431(n) (emphasis added).

Just prior to oral argument before the appellate court, plaintiff cited the court to a non-binding Notice of Proposed Rulemaking which the FRA published in 1991. 56 Fed.Reg. 3434 (1991).[6/] The FRA's proposed rulemaking was in response to the 1988 Congressional directive that the FRA publish such fall protection regulations "as may be necessary" for the safety of railroad bridge workers. *Id.* The preamble to the 1991 Notice revisited the 1978 FRA Policy Statement and offered a retrospective interpretation which plaintiff embraced. According to the preamble, the FRA did not expect to be taken literally when it stated at 43 Fed.Reg. 10587 (1978) that: "OSHA regulations would not apply to...railroad bridges" because they were "so much a part of the operating environment..." (pp. A53-54). According to the 1991 interpretation of the 1978 Policy Statement, the FRA only "intended to displace OSHA regulations with respect to the surfaces on bridges..., but did not intend to prevent OSHA from exercising its more general responsibilities... with respect to fall protection...." 56 Fed.Reg. 3435 (p. A70).

The appellate court, however, considered the 1991 interpretation of the 1978 Policy Statement to be unpersuasive (pp. A27-28). Federal decisional law had already determined that the FRA's explicit assertion of exclusive jurisdiction in 1978 had effectively ousted OSHA from the railroad "operating environment," to include railroad bridges. As the appellate court noted, the preamble to the 1991 Notice included just such a concession:

> ...Both courts and the Occupational Safety and Health Review Commission have held that the assertion of authority in a policy statement constitutes an exercise of FRA's

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[6/] Relevant excerpts from the Notice of Proposed Rulemaking are reprinted at Appendix K (pp. A66-73).

> statutory authority under the rail safety laws sufficient to displace OSHA standards pursuant to section 4(b)(1) of the OSHA Act with respect to health and safety issues intrinsic to 'railroad operations.' *Velasquez v. Southern Pacific Transp. Co.*, 734 F.2d 216, 218 (5th Cir. 1984); *Southern Pacific Transp. Co. v. Usery*, 539 F.2d 386 (5th Cir. 1976), *cert. denied*, 434 U.S. 874 (1977); *Consolidated Rail Corp.*, 10 OSHC (BNA) 1577 (1982). 56 Fed.Reg. 3435 (1991)

(See, p. A28).

Under such circumstances, the appellate court concluded that the FRA's 1991, non-binding interpretation of the 1978 Policy Statement was not entitled to significant weight. Instead, the appellate court determined to follow the persuasive authority of settled federal law, including *Velasquez v. Southern Pacific Transp. Co.*, *supra*, in finding that the trial court committed reversible error in instructing the jury that North Western could be found negligent for allegedly violating OSHA's inapplicable regulations (pp. A31-32).

C. Proceedings Before the Supreme Court of Illinois

Plaintiff petitioned the Supreme Court of Illinois for further review characterizing the appellate court opinion as a "potentially disastrous opinion for the entire Illinois court system." According to plaintiff's petition, the Illinois judiciary was not "bound to slavishly follow" federal decisional law in determining rights and obligations under the FELA, because the United States Courts of Appeal had not shown a similar deference to the highest court of Illinois. Plaintiff contended that although "the courts of Illinois may be compelled" to follow the decisions of the United States Supreme Court, the state courts were not obliged to defer to those of the United States Courts of Appeal. Therefore, plaintiff urged the Supreme Court of Illinois to reverse the appellate court, so

that "the beneficial effect of OSHA is not denied other railroad workers in Illinois."

The Supreme Court of Illinois not only granted plaintiff's petition and accepted his appeal, but in a divided opinion, the state high court reversed the appellate court and declared that OSHA's regulations did apply to railroad bridges at the time of plaintiff's 1984 accident. That opinion is cited at 151 Ill.2d 325 and 603 N.E.2d 441. (See, pp. A1-20).

The majority of the divided state court found the FRA's 1978 Policy Statement to be "ambiguous" and "unclear" when applied to railroad bridges (pp. A6, A8-9). According to the court's opinion, the Policy Statement is "subject to two competing interpretations which are equally reasonable" (p. A9). In resolving the perceived ambiguity, the majority reasons that it should give controlling weight to the 1991 Notice of Proposed Rulemaking, which interpreted the 1978 Policy Statement to only foreclose OSHA's regulations from applying to the surfaces of railroad bridges, and not to safety hazards presented by possible falls from such surfaces (p. A7).

The state high court opinion declares that it is not necessary to "consider the question of whether Illinois courts are bound to follow the decisions of lower Federal courts when interpreting Federal law" (p. A10). The court states that federal decisional law may be avoided altogether, if one simply looks to the administrative construction of a disputed statute or regulation. The majority reasons that "(b)ecause the Railroad Administrator's 1991 notice of proposed rulemaking contains an interpretation [of the 1978 Policy Statement] which is not plainly erroneous, we will follow the Railroad Administrator's interpretation rather than the *Velasquez* court" (p. A10).

The court also refuses to attach any significance to relevant federal legislation. The court recognizes that the Rail Safety Improvement Act of 1988, 45 U.S.C. §431(n), directed FRA, not OSHA, to issue all bridge fall protection regulations "as may be necessary," but the court reasons that the statute did not answer the question of whether the FRA had already ceded its jurisdiction to OSHA prior to 1988 (p. A10).

The state court's dissenting opinion, however, finds the majority's holding and reasoning to be without any "legitimate basis" (p. A20). The dissent would affirm the decision of the Appellate Court of Illinois. The dissenting justices find no ambiguity in the FRA's 1978 Policy Statement declaring the FRA's exclusive jurisdiction over railroad bridges; and, even if ambiguity is assumed *arguendo*, the dissent criticizes the majority's "illogical" reliance upon the 1991 Notice to resolve any uncertainty in the 1978 Policy Statement (pp. A16-18).

The dissent points out that by elevating the 1991 interpretation into law, and choosing to ignore contrary federal precedent, the majority creates the very confusing, overlapping regulatory jurisdiction over the nation's railroads which Congress and the FRA clearly intended to avoid (p. A16). According to the majority's "absurd" rationale, OSHA and the FRA would share jurisdiction over the same occupational hazard, namely falling from a railroad bridge. The FRA would have sole authority to determine the appropriate use of surface safety aids, such as construction barricades, side railings, toe boards and hole covers over and around bridge floor openings, while OSHA would share authority to determine how an employee should be protected when, if ever, he should step through such an opening, or fall over the edge of the bridge (p. A17).

North Western responded to the state high court's divided opinion by filing a petition for rehearing. The railroad's petition contended that the state court's retroactive application of the 1991 interpretation of the 1978 Policy Statement raised substantial issues of due process of law under the United States Constitution which the majority of the court failed to appreciate. If, as the majority concluded, the 1978 Policy Statement was so "ambiguous" that it was subject to "two equally reasonable" competing interpretations, it surely could not be fair to retroactively resolve the perceived ambiguity against North Western based upon a regulatory interpretation which post-dated plaintiff's accident and conflicted with pre-existing federal decisional law. More particularly, North Western urged that it was fundamentally unfair of the court to affirm a finding of negligence under the FELA and hold the railroad liable to pay $3.5 million in damages for "violating" OSHA construction regulations, after the court, itself, had judicially determined that North Western could have "reasonably" believed that the OSHA construction regulations did not apply to railroad bridges.

The state high court, however, offered no comment in denying North Western's petition for rehearing (p. A21). Thus, its opinion reversing the Appellate Court of Illinois stands. That opinion is now the law of the case and the law of Illinois.

REASONS FOR GRANTING THE WRIT

I.
THE SUPREME COURT OF ILLINOIS' REFUSAL TO FOLLOW THE OVERWHELMING WEIGHT OF FEDERAL AUTHORITY ESTABLISHING THE JURISDICTIONAL BOUNDARIES OF TWO FEDERAL AGENCIES OVER THE NATIONAL RAILROAD INDUSTRY SHOULD NOT BE ALLOWED TO STAND

The state high court's unprecedented expansion of OSHA jurisdiction in this case will promote overlapping OSHA/FRA jurisdiction over railroad operations in derogation of national transportation policy and cause great confusion in cases brought under the FELA. Yet, of even greater significance and concern is that the state court felt utterly free to resolve issues of federal statutory and regulatory interpretation contrary to established federal precedent and stated national transportation policy.

Rarely has a state court decision so devastatingly demonstrated the wisdom inherent in the observation that federal statutes may prove to be "awkward guests" in state courts.[7/] If allowed to stand, the Illinois opinion will be a catalyst for further attempts to undermine the oft-stated Congressional goal of uniformity in railroad safety regulation. If railroad bridges -- one of the areas explicitly reserved exclusively to FRA jurisdiction in the 1978 Policy Statement -- can be subjected to overlapping, piecemeal OSHA jurisdiction, then so can countless other areas of railroad operations previously believed to be solely within the FRA's domain. The result will be a multiplicity of future attempts to inject OSHA regulations into other FELA claims and a prolifera-

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7/ Herman, Susan N., *Beyond Parity: Section 1983 and the State Court*, 54 Brook. L. Rev. 1057 (1989).

tion of inconsistent results and further appeals which will undermine the Congressional goal of "a uniform body of regulations and enforcement" in the railroad industry. *See*, Federal Railroad Safety Act, 45 U.S.C. §434; H.R. Rep. No. 1194, 91st Cong., 2d Sess., reprinted in [1970] U.S. Code Cong. & Admin. News 4104, 4109-4111.

A. The Illinois Court's Decision Squarely Conflicts With Federal Precedent Delineating the Relationship Between OSHA and the FRA and Uniformly Awarding the FRA Exclusive Jurisdiction Over Railroad Bridges

The state high court's opinion is written as though it were one of first impression when, in fact, all of the federal questions it addressed had previously been resolved by Congress, the FRA, the OSHA Review Commission, and the federal courts. Those federal deliberative and adjudicatory bodies had already created an entire fabric of consistent, well-reasoned law which the state court chose not only to ignore, but to contradict.

The federal courts have not been unmindful of the salutary purpose of the Occupational Safety and Health Act of 1970 (OSH Act), 29 U.S.C. §§651-678, and the regulations authorized to be issued thereunder. The federal courts have, however, consistently declared that the broad, generic regulations promulgated under the OSH Act are rendered inapplicable according to the OSH Act's own terms (29 U.S.C. §653(b)(1)) whenever an industry-specific agency, such as the FRA, should exercise its primary jurisdiction over the working conditions at issue. *Southern Pacific Transp. Co. v. Usery*, 539 F.2d 386, 391 (5th Cir. 1976), *cert. denied*, 434 U.S. 874 (1977); *Southern Ry. v. Occupational Saf. & H. Rev. Comm'n.*, 539 F.2d 335, 339 (4th Cir. 1976), *cert. denied* 429 U.S. 999 (1976).

Southern Ry. was one of the first appellate court opinions to address the preemptive impact of FRA pronouncements as measured against Section 4(b)(1) of the OSH Act (29 U.S.C. §653(b)(1)). In *Southern Ry.*, the Secretary of Labor took the position that the phrase "working conditions" appearing in Section 4(b)(1) should be understood to mean "particular, discrete hazards" encountered by an employee in the course of his job activities. Accordingly, the Secretary argued that OSHA could extend and maintain its jurisdiction in every "nook and cranny" of the railroad working environment not covered by a competing standard or regulation promulgated by the FRA. *Id.* at 338.

The Fourth Circuit, however, flatly rejected the Secretary's interpretation of Section 4(b)(1). *Id.* at 339. Instead, the Court of Appeals considered the definition provided in *Corning Glass Works v. Brennan*, 417 U.S. 188 (1974) to be dispositive, because this Court there instructed that the phrase "working conditions" should be defined to include "surroundings" as well as "hazards." *Corning Glass Works*, 417 U.S. at 202. Therefore, the Fourth Circuit concluded that should the FRA exercise its statutory authority over any environmental area in which an employee customarily goes about his daily tasks, "the authority of the Secretary of Labor in that area is foreclosed." *Southern Ry.*, 539 F.2d at 339.

Southern Pacific Transp. Co. v. Usery, 539 F.2d 386 (5th Cir. 1976), *cert. denied*, 434 U.S. 874 (1977), reached the same conclusion, again citing *Corning Glass Works*. In *Southern Pacific*, the Fifth Circuit acknowledged that the FRA had authority to oust OSHA's regulations from applying to the railroad industry, whether or not the FRA imposed like regulations:

> Neither OSHA itself nor the existence of OSHA regulations affects the ability of the primary regulatory agency, here the FRA, to articulate its regulations as it chooses. Much of their displacing effect will turn on that articulation. Section 4(b)(1) means that any FRA exercise directed at a working condition -- defined either in terms of a "surrounding" or a "hazard" -- displaces OSHA coverage of that working condition.... Furthermore, as the dominant agency in its limited area, the FRA can displace OSHA regulations by articulating a formal position that a given working condition should go unregulated or that certain regulations -- and no others -- should apply to a defined subject.

Southern Pacific Transp. Co., 539 F.2d at 391-92. See also, *Ray v. Atlantic Richfield Co.*, 435 U.S. 151 (1978).

Other federal courts of appeal have concluded that the FRA's expansive March 14, 1978 Policy Statement actually foreclosed entire areas of the railroad industry to OSHA's regulations, even though the Policy Statement did not publish competitive regulations addressing each perceived safety hazard previously assessed by OSHA's more generic regulations. *Velasquez v. Southern Pacific Co.*, 734 F.2d 216 (5th Cir. 1984); *Norfolk & W. Ry. v. Public Utilities Comm'n. of Ohio*, 727 F.Supp. 367, *aff'd*, 926 F.2d 567 (6th Cir. 1991). Also see, *Norfolk & W. Ry. v. Burns*, 587 F.Supp. 161 (S.D. Mich. 1984).

In particular, uniform federal precedent has read the express language of the Policy Statement to plainly include railroad bridges within the FRA's exclusive jurisdiction:

> Finally, in 1978, the FRA issued a statement indicating which aspects of the railroad industry fall under its exclusive jurisdiction thereby displacing applicable OSHA regulations: "OSHA regulations would not apply to...railroad bridges.... These are areas which are so much a part of the operating environment that they must be regulated by the agency with

primary responsibility for railroad safety. 43 Fed.Reg. 10587 (1978)."

Norfolk & W. Ry. v. Public Utilities Comm'n. of Ohio, 727 F.Supp. at 370, *aff'd*, 926 F.2d 567. *Accord*: *Velasquez v. Southern Pacific Co.*, *supra*.

OSHA's own Review Commission has interpreted the FRA's 1978 Policy Statement just as literally. In *Secretary of Labor v. Consolidated Rail Corp.*, 10 OSHC 1577 (1982), OSHA'S Review Commission recognized that "The FRA policy statement of March 14, 1978 is an exercise of statutory authority within the meaning of section 4(b)(1)...." 10 OSHC at 1579. In the same proceeding, the OSHA Review Commission recognized that the FRA was "the experienced and expert agency in railroad safety matters" and that the 1978 Policy Statement constituted a clear exercise of FRA's authority to foreclose OSHA's regulations from applying to those railroad facilities and structures enumerated in the Statement. 10 OSHC at 1579-81.

B. The State High Court's Opinion Conflicts With All Reasonably Contemporaneous Statements of FRA Intent

All reasonably contemporaneous expressions of FRA intent confirm that the FRA meant what it said in the 1978 Policy Statement -- safe working conditions on railroad bridges are subject to exclusive FRA jurisdiction and are outside of OSHA's purview.

The FRA has consistently gone "on record" against an expansive OSHA jurisdiction. In a memorandum prepared by the General Counsel for the Department of Transportation in 1975, FRA's counsel complained that OSHA's reluctance to see its authority properly limited by Section 4(b)(1) of the OSH Act was preventing an amicable resolution of the two agencies' jurisdic-

tions.[8/] In the memorandum, the FRA counsel took great exception to OSHA's reluctance to recognize the doctrine of negative preemption, whereby the FRA might oust OSHA without promulgating competing regulations:

> Apparently, in the view of OSHA, the failure of an agency to promulgate a standard because none is needed, or the failure of an agency to promulgate a standard which states a particular condition need not be met, would constitute a failure of the agency to exercise its jurisdiction. Rejection by OSHA of "negative regulation" ignores reality.

Vol. 4, Occ. Saf. & H. Rep., p. 1073.

Even before it published its 1978 Policy Statement, the FRA exercised its exclusive jurisdiction over safe working conditions on railroad bridges based upon its special expertise and knowledge concerning the railroad industry. In November, 1976, the FRA addressed the issue of whether walkways should be required as a form of employee fall protection on all railroad bridges. 41 Fed.Reg. 50302 (1976).[9/] This FRA rulemaking was terminated in April, 1977 when the FRA concluded that such a mandate could not be justified because it would impose significant added financial burdens on the railroad industry. The FRA determined that diverting railroad resources from other maintenance and improvement projects would not serve the overall interests of employee safety. 42 Fed.Reg. 22185 (1977).[10/]

[8/] Memorandum of the General Counsel for the Department of Transportation re: "Interpretation of Section 4(b)(1) of the Occupational Safety Act of 1970." Vol. 4, Occ. Saf. & H. Rep. 1072, 1074 (B.N.A. 1975). Also attached hereto as Appendix M (p. A75).

[9/] Relevant excerpts from this notice of proposed rulemaking is attached hereto as Appendix I (p. A60).

[10/] Relevant excerpts from the FRA's decision is attached hereto as Appendix J (p. A62).

Following its publication of the 1978 Policy Statement, the FRA continued to assert exclusive jurisdiction over areas, such as railroad bridges, which pertained to the industry's operating environment. For example, in *Secretary of Labor v. Consolidated Rail Corp.*, 10 OSHC 1577 (1982), evidence provided by the FRA helped convince OSHA's Review Commission to rule that the 1978 Policy Statement foreclosed OSHA's regulations from applying to railroad operating areas. In *Consolidated Rail Corp.*, the FRA Administrator, John M. Sullivan, provided a letter affidavit strongly asserting the FRA view "that existing FRA regulations constitute a comprehensive exercise of authority over working conditions which are rooted in railroad operations." 10 OSHC at 1579 n. 8.

The FRA continued to claim exclusive jurisdiction over operating areas such as railroad bridges in later corresponding with OSHA. As recently as March 2, 1989, the FRA's Assistant Chief Counsel wrote to the Secretary of Labor advising that fall protection for railroad bridge workers should not concern OSHA:

> As to protection of maintenance-of-way workers performing track maintenance or repair, responsibility for their safety is FRA's according to the Policy Statement issued by FRA March 14, 1978, which delineates respective areas of FRA and OSHA jurisdictional authority. 43 F.R. 10583.
>
> . . .
>
> ...(T)he Policy Statement provides that "...These are areas which are so much a part of the operating environment that they must be regulated by the agency with primary responsibility for railroad safety." 43 F.R. 10587....

Appendix N (pp. A82-83).[11/]

[11/] The letter was cited in testimony offered by the Railway Labor Executives' Association in the Congressional Oversight Hearing into Railroad Safety which was conducted in 1990, and is part of the record below.

Finally, in keeping with the Congressional mandate found in the Railroad Safety Improvement Act, 45 U.S.C. §431 (1988), the FRA has, in fact, published its own safety regulations pertaining to railroad bridge workers' fall protection which includes regulations pertaining to nets and safety belts as well as side railings, walkways, etc. 57 Fed.Reg. 28116 (1992).

C. The Illinois Court's Decision Squarely Conflicts With Federal FELA Precedent

As accurately stated by the dissenting Illinois justices: "*Velasquez v. Southern Pacific Transp. Co.* (5th Cir. 1984), 734 F.2d 216, is materially indistinguishable from the instant case" (p. A18).

Velasquez involved a railroad employee who was injured in a fall from a bridge. As here, the trial court denied the defendant's motion *in limine* to exclude evidence of OSHA regulations and permitted plaintiff's expert witness to "explain" to the jury how application of the OSHA regulations would have prevented plaintiff's accident. There too, the OSHA standards were accepted into evidence and the court instructed the jury in a manner akin to the jury instruction provided in this case. *Velasquez*, 734 F.2d at 218.

The *Velasquez* jury also returned a verdict against the railroad defendant reduced by plaintiff's contributory negligence. On appeal, however, the Fifth Circuit held that the OSHA regulations did *not* apply to working conditions on railroad bridges and walkways because the FRA's declaration of March 14, 1978, had clearly displaced OSHA's regulations. *Velasquez*, 734 F.2d at 218. Furthermore, the Court of Appeals concluded in *Velasquez* that the overwhelming prejudice created by plaintiff's repeated references to the inapplicable OSHA

standards constituted reversible error, particularly because the trial court's instructions endorsed the error and invited the jury to think of the railroad as a federal law violator. *Velasquez*, 734 F.2d at 218-19.

In acknowledging *Velasquez*, the court below makes no pretense of engaging in any thoughtful analysis calculated to promote reasonable uniformity and constancy in federal law. The state high court does not even acknowledge the fact that its decision independently expands employer liability under the FELA, contrary to this Court's general admonition that "what constitutes negligence for the statute's purpose is a federal question" to be "governed" by recourse to "federal decisional law." *Urie v. Thompson*, 337 U.S. 163, 174 (1949). *Accord*: *Rogers v. Missouri Pacific R.R.*, 352 U.S. 500, 507 (1957); *Bailey v. Central Vermont R.R.*, 319 U.S. 350, 352, (1943).

In choosing to ignore not only *Velasquez*, *supra*, but the whole fabric of federal law cited herein, the Supreme Court of Illinois has irresponsibly created independent judicial precedent directly at odds with settled federal law and in opposition to national transportation policy. Thus, plenary consideration of this case by the Court is essential.

II.
THE DECISION BELOW TO ELEVATE AN ISOLATED, RETROSPECTIVE, NON-BINDING STATEMENT OF A FEDERAL ADMINISTRATOR ABOVE CONTRARY FEDERAL LAW IS UNPRECEDENTED

There is still another compelling reason why the state court opinion should not be allowed to remain a disparate part of the fabric of federal regulatory law. That is, the unquestioning deference the lower court pays to the FRA's 1991 "interpretation" of the 1978 Policy Statement. This Court and commentators alike

have cautioned that such agency interpretations must always be measured against a court's best reading of Congress' own overriding intent; the greater constitutional framework of federal law; and the goal of promoting sound regulatory policy.[12/] Moreover, as the dissenting opinion pointed out below, such unquestioning deference is particularly inappropriate when the agency "interpretation" is not even remotely contemporaneous with the regulation it purports to interpret, and is inconsistent with the regulation's policy and language (pp. A15-16).

The divided state court cites this Court's opinion in *Udall v. Tallman*, 380 U.S. 1, 16-17 (1965), in support of the blind deference it awards to the FRA's 1991 Notice of Proposed Rulemaking (p. A6). In *Udall*, however, this Court gave deference to an agency's interpretation of federal regulations precisely because the interpretation was consistent with prior agency practice and it was a "*contemporaneous construction*" of the regulation at issue. *Udall*, 380 U.S. 1, 17 (emphasis added). *Accord*: *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 417-18 (1945).

Here, of course, the 1991 interpretation of the 1978 Policy Statement could not be defined as "contemporaneous." The non-binding, 1991 interpretation to which the majority of the state court attached "controlling" weight came thirteen years after the 1978 Policy Statement, over seven years after plaintiff's accident, and over one year after the trial of the case was completed. Moreover, the 1991 retrospective interpretation had not been reaffirmed by agency action over a period of time. Instead, the

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[12/] *Consumer Product Saf. Comm'n. v. GTE Sylvania, Inc.*, 447 U.S. 102, 117-120 (1980); Sunstein, C. R., *Interpreting Statutes in the Regulatory State*, 103 Harv. L. Rev. 405, 428 (1989).

1991 retrospective interpretation was contradicted by prior agency statements interpreting the 1978 Policy Statement.

Under such circumstances, the federal courts have consistently held that retrospective administrative interpretations are *not* entitled to significant weight. *Order of Railway Conductors v. Swan*, 152 F.2d 325 (7th Cir. 1945), *aff'd*, 329 U.S. 520 (1947); *Matter of Sinclair*, 870 F.2d 1340, 1342-43 (7th Cir., 1989); *Wisconsin Cheesemen, Inc. v. United States*, 388 F.2d 420 (7th Cir. 1968). *Land O'Lakes Creameries, Inc. v. Commodity Credit Corp.*, 265 F.2d 163 (8th Cir. 1959); *Drew v. Lawrimore*, 257 F.Supp. 659, 669-70 (D.C. S.C. 1966).

Certainly this Court has not deferred to agencies' interpretations of regulations where, like here, those interpretations are wholly unsupported by an agency's prior pronouncements or administrative practices; and where, like here, judicial affirmation of the administrative agency's retroactive interpretation would intrude upon reasonable reliance interests. See, *Heckler v. Community Health Serv.*, 467 U.S. 51, 60 n. 12 (1984); *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 295 (1974); *Atchison, T. & S.F. R.R. v. Wichita Bd. of Trade*, 412 U.S. 800, 807-808 (1973); *SEC v. Chenery Corp.*, 332 U.S. 194 (1947).

The deference shown the FRA's 1991 Notice of Proposed Rulemaking by the court below also ignores an administrative proclivity which has long been judicially acknowledged — the tendency of administrative agencies to advance their own private agendas through retrospective public pronouncements.[13/]

[13/] *Consumer Product Saf. Comm'n. v. GTE Sylvania, Inc.*, 447 U.S. 102, 117-120 (1980); *United States v. United Mine Workers*, 330 U.S. 258, 282 (1947); also see, Sunstein, C. R., *Interpreting Statutes in the Regulatory State*, 103 Harv. L. Rev. 405 (1989).

Indeed, this Court has oft-repeated the warning that even "the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one." *United States v. Price*, 361 U.S. 304, 313 (1960) quoted in *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 348-49 (1963) and in *Consumer Product Saf. Comm'n. v. GTE Sylvania, Inc.*, 447 U.S. 102, 112-113 (1980).

The 1991 Notice was certainly published under unusual circumstances. Gilbert E. Carmichael was now the Federal Administrator and he was under intense Congressional criticism for not responding to the Rail Safety Improvement Act's mandate that the FRA should address fall protection for railroad bridge workers "within one year." 45 U.S.C. §431(n).[14/] More than two years had elapsed, but the FRA had yet to act.

Retrospectively ceding fall protection jurisdiction to OSHA would save agency face by deflecting Congressional criticism with no attendant loss of real agency authority. A retrospective concession of authority to OSHA would suggest to Congressional critics that fall protection had been under some form of active federal supervision, while leaving the FRA free to once more declare that it would henceforth exercise exclusive jurisdiction over the subject matter because bridges presented hazards unique to the railroad operating environment.[15/]

[14/] The record below further reveals that Mr. Carmichael was not affiliated with the FRA in any capacity until 1989. In 1978, at the time the Policy Statement was published, he was a private citizen selling real estate and automobiles in Meridian, Mississippi. (See, Ltr. Brf. filed before Appellate Ct.).

[15/] The comparable rationales by which the FRA justified preempting OSHA's jurisdiction in both 1978 and 1991 is illuminating. Compare 43 Fed.Reg. 10587 (pp. A53-54) with 56 Fed.Reg. 3436 (pp. A71-72).

Of course, the blanket rule of agency deference which the lower court erroneously adopted, did not allow for any questioning of agency motivation, no more than it called for any evaluation of the merits of the contrary federal decisional law or of Congress' overriding intent. The lower court simply adopted the retrospective agency interpretation because it was "not plainly erroneous." Such an unreasoned deference to a non-contemporaneous agency "interpretation" has no place in the fabric of federal law, and should not be allowed to stand. It provides another compelling reason why this Court should review this case.

III.
THE LOWER COURT'S RETROACTIVE APPLICATION OF ITS UNPRECEDENTED INTERPRETATION OF FEDERAL LAW DEPRIVED PETITIONER OF DUE PROCESS OF LAW

The opinion entered by the state court failed to recognize that fundamental principles of due process also shaped its obligation to correctly interpret and apply federal law. As this Court instructed in *Felder v. Casey*, 487 U.S. 131 (1988):

> Just as federal courts are constitutionally obligated to apply state law to state claims...[when exercising diversity or pendent jurisdiction]....so too the Supremacy Clause imposes on state courts a constitutional duty to proceed in such a manner that all the substantial rights of the parties under controlling federal law are protected. [Citations].

Felder, 487 U.S. at 151. *Also see*, *Atlantic Coast Line R. v. Burnette*, 239 U.S. 199, 201 (1915).

Here, the lower court utterly fails in its obligation. First, in disregard of federal precedent, the lower court finds the FRA's 1978 Policy Statement to be "ambiguous" and "unclear" with reference to the phrases "hazardous construction working conditions" and "railroad operations" (pp. A6-8). In reference to

bridge construction in particular, the majority concludes that the Policy Statement is "subject to two competing interpretations which are equally reasonable" -- one that would conclude that the FRA had preempted OSHA from regulating the use of fall protection equipment on railroad bridges and one that would conclude that it had not.

Having made its initial finding of ambiguity in contradiction of federal precedent, the majority then looks to the non-binding interpretation of the 1978 Policy Statement issued by the FRA in 1991. Reasoning that the FRA's 1991 interpretation is controlling unless "plainly erroneous," the majority concludes that the OSHA fall regulations apply to the present case.

In so doing, the court committed error of constitutional proportions. Faced with a choice between "two...equally reasonable" interpretations of the Policy Statement, the court was compelled by fundamental considerations of due process to elect the interpretation which would *not* give the Policy Statement a retroactive effect. As this Court instructed in *Bowan v. Georgetown University Hosp.*, 488 U.S. 204, 208 (1988): "Retroactivity is not favored in the law. Thus,... *administrative rules will not be construed to have retroactive effect unless their language requires this result.*" (Emphasis added.) *E.g.*, *Greene v. United States*, 376 U.S. 149, 160 (1964); *Claridge Apartments Co. v. Commissioner*, 323 U.S. 141, 164 (1944).

The language of the Policy Statement did not require the lower court to apply the Statement retroactively to North Western's prejudice. The lower court, itself, found that the Statement was "ambiguous" and subject to "two...equally reasonable" interpretations. Clearly then, the Court erred in electing the 1991 interpretation for to do so would give that interpretation retroac-

tive effect without providing North Western with fair notice of the conduct that was required of it.[16/]

There is no more fundamental principle ingrained in Anglo-American law than that which requires that the law speak with reasonable clarity. As definitively stated by this Court, "a statute or regulation which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law." *Connally v. General Const. Co.*, 269 U.S. 385, 391 (1926); *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 665 (1985).

Nor may it be logically reasoned that the threat posed to due process of law by the retroactive enforcement of the "ambiguous" regulation might be cured by the original jury's finding of railroad negligence. In *Grayned v. City of Rockford*, 408 U.S. 104 (1972), this Court explained that the interpretation of "ambiguous" regulations or statutes may not be delegated to a jury for *ad hoc* resolution:

> ...Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. [Citations] Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. [Citations] A vague law imper-

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[16/] Indeed, the FRA's 1991 Notice, itself, conceded that its unique interpretation of the explicit language used in its 1978 Policy Statement had previously eluded everyone, *including the FRA's own safety inspectors*: "(T)hese distinctions have proved confusing to the regulated community, railroad employees, inspectors, and in some instances, adjudicatory bodies." 56 Fed.Reg. 3435 (p. A70).

> missibly delegates basic policy matters to policemen, judges and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application. [Citations].

Grayned, 408 U.S. at 108-09.

There exists voluminous federal precedent holding that civil penalties may *not* be levied against an employer for alleged violations of ambiguous OSHA regulations which do not provide reasonable notice of the conduct which is required of the employer. See, *e.g.*, *S & H Riggers & Erectors, Inc. v. Occupational Saf. & H. Rev. Comm'n.*, 659 F.2d 1273 (5th Cir. 1981); *Brennan v. Occupational Saf. & H. Rev. Comm'n.*, 513 F.2d 713 (8th Cir. 1975); *Kent Nowlin Const. Co. v. Occupational Saf. & H. Rev. Comm'n.*, 593 F.2d 368 (10th Cir. 1979); *Diamond Roofing Co., Inc. v. Occupational Saf. & H. Rev. Comm'n.*, 528 F.2d 645 (5th Cir. 1976).

The holdings of all such cases is appropriately summarized in *Kent Nowlin Const. Co.*, quoting from *Diamond Roofing*, as follows:

> An employer, however, is entitled to fair notice in dealing with his government. Like other statutes and regulations which allow monetary penalties against those who violate them, an occupational safety and health standard must give an employer fair warning of the conduct it prohibits or requires, *and it must provide a reasonably clear standard* of culpability to circumscribe the discretion of enforcing authorities and its agents (emphasis added).

Kent Nowlin Const. Co., 593 F.2d at 371.

Here, accepting the lower court's characterization of the federal regulatory scheme as "ambiguous," the FRA's 1991 clarification did not become available until 7 years *after* plaintiff's accident and almost two years *after* this case was tried. Such

circumstances did not impose a "reasonably clear standard" and did not give the North Western reasonably clear notice of the need for compliance with the OSHA standard at the time of plaintiff's accident in 1984.

The opinion entered by the state court, which retroactively penalizes North Western by upholding the $3.5 million verdict entered against it, raises constitutional issues of considerable consequence. The opinion below does not grow out of the greater constitutional framework of federal law; it collides with it. Fundamental considerations of due process, therefore, mandate that this case be fully reviewed by this Court.

CONCLUSION

For the foregoing reasons, the writ of certiorari should be granted.

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Supreme Court, U.S.
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No. 92-1428

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

CHICAGO AND NORTH WESTERN TRANSPORTATION COMPANY,

Petitioner,

v.

TRACY TEMPLETON,

Respondent.

Petition for Writ of Certiorari to the Supreme Court of Illinois

APPENDIX TO THE PETITION FOR WRIT OF CERTIORARI

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APPENDIX A

SUPREME COURT OF ILLINOIS

No. 71783
July 30, 1992

TRACY TEMPLETON, Appellant,
v.
CHICAGO AND NORTH WESTERN
TRANSPORTATION COMPANY, Appellee.

JUSTICE CLARK delivered the opinion of the court:

The plaintiff, Tracy Templeton, was an employee of the defendant railroad, Chicago and North Western Transportation Company. On January 27, 1984, plaintiff was performing track work on a bridge located in Pekin, Illinois. Plaintiff fell through an opening in the bridge deck and landed on ice 31 feet below the bridge. Plaintiff filed suit in the circuit court of Cook County under the Federal Employers' Liability Act (45 U.S.C. §51 (1988)), to recover damages for the injuries he sustained as a result of the fall. A jury awarded plaintiff damages in the amount of $3.5 million after a reduction of 14% for plaintiff's contributory negligence.

Defendant appealed contending, *inter alia*, that the trial court improperly admitted into evidence "fall-protection" regulations issued by the Federal Occupational Safety and Health Administration (OSHA) and instructed the jury on the same. The appellate court reversed (211 Ill.App.3d 489), and we granted plaintiff's petition for leave to appeal (134 Ill.2d R.315).

At issue in this case is whether OSHA's fall-protection regulations applied to the railroad bridge upon which plaintiff was working at the time of the accident. Defendant argues that OSHA's regulations did not apply because the Federal Railroad Administration (Railroad Administration) had asserted its exclusive authority over railroad bridges and, thereby, displaced OSHA's jurisdiction over the bridge. Defendant relies on the Railroad Administration policy statement issued in 1978 as support for this argument.

The Occupational Safety and Health Act of 1970 (29 U.S.C. §651 *et seq.* (1988)) was enacted to address the problems caused by personal injuries and illnesses arising out of working conditions. As part of the solution to this problem, Congress authorized the Secretary of Labor to "set mandatory occupational safety and health standards applicable to businesses affecting interstate commerce." (29 U.S.C. §651(b)(3) (1988).) Pursuant to the Occupational Safety and Health Act, OSHA has general authority to promulgate health and safety regulations relative to hazards arising out of working conditions.

At trial, plaintiff introduced into evidence two OSHA fall-protection regulations which are contained in OSHA's construction industry regulations. (See 29 C.F.R. §§1926.104, 1926.105 (1991).) One of the regulations entered into evidence provides in pertinent part:

> "Safety nets shall be provided when workplaces are more than 25 feet above the ground or water surface, or other surfaces where the use of ladders, scaffolds, catch platforms, temporary floors, safety lines, or safety belts is impractical." 29 C.F.R. §1926.105(a)(1991).

Because this regulation was incorporated into the general industry standards applicable to all industries (29 C.F.R. §1910.12 (1991)), plaintiff claims it applies to work on railroad bridges.

Defendant argues that OSHA's fall-protection regulations do not apply to this case because the Railroad Administration has specifically preempted OSHA from regulating work on railroad bridges. Section 4(b)(1) of the Occupational Safety and Health Act provides in pertinent part:

> "Nothing in this chapter shall apply to working conditions of employees with respect to which other Federal agencies *** exercise statutory authority to prescribe or enforce standards or regulations affecting occupational safety or health." (29 U.S.C. §653(b)(1) (1988).)

In order for another Federal agency, in this case the Railroad Administration, to preempt OSHA regulations under section 4(b)(1), that agency must have statutory authority to regulate a specific industry and it must exercise that authority over a particular working condition. *Southern Pacific Transportation Co. v. Usery* (5th Cir. 1976), 539 F.2d 386.

Under the Federal Railroad Safety Act of 1970 (45 U.S.C. §421 *et seq.* (1988)), the Railroad Administration is the primary agency responsible for regulating the railroad industry and has the statutory authority to issue safety regulations for railroads which would displace OSHA regulations. In 1978, the Railroad Administration issued a policy statement which outlined its position on those areas of the railroad industry for which the Railroad Administration was preempting OSHA regulations.

(43 Fed. Reg. 10583 (1978).) Although the policy statement did not promulgate any new safety regulations, it was sufficient to preempt OSHA from exercising jurisdiction over *some* aspects of the railroad industry. See *Velasquez v. Southern Pacific Transportation Co.* (5th Cir. 1984), 734 F.2d 216; *Secretary of Labor v. Consolidated Rail Corp.* (1982), 10 O.S.H. Cas. (BNA) 1577.

However, it is clear from the policy statement that the Railroad Administration did not intend to completely displace OSHA regulations. The policy statement envisions an evolving, cooperative relationship between the two Federal Agencies. For example, in the policy statement the Railroad Administration stated the following:

> "[The Railroad Administration] recognizes that OSHA currently is not precluded from exercising jurisdiction with respect to conditions not rooted in railroad operations nor so closely related to railroad operations as to require regulation by [the Railroad Administration] in the interest of controlling predominant operational hazards.
>
> ***
>
> *** We believe the policy set forth in this document will assure that each of the principal Federal agencies charged with the responsibility for carrying out this program, that is, [the Railroad Administration] and OSHA, will concentrate its efforts in those areas in which it possesses the greatest experience and expertise. In those cases in which there may be some question as to which is the primary regulatory agency, *cooperative efforts between the two agencies should avoid the creation of regulatory gaps* on the one hand, or unnecessary duplication on the other. At any time that a hazardous working condition impacts upon the overall safety of railroad operations, [the Railroad Administration] will take

> the initiative in developing a proper regulatory response." (Emphasis added.) 43 Fed.Reg. at 10587-90 (1978).

In the policy statement, the Railroad Administration specifically addressed the applicability of 13 separate categories of OSHA regulations. Defendant cites the following passage from the Railroad Administration's discussion of OSHA's "walking-working surfaces" regulations as proof that the Railroad Administration intended to displace OSHA from regulation of all working conditions on railroad bridges:

> "OSHA regulations concerning working surfaces deal with such matters as ladders, stairways, platforms, scaffolds and floor openings. Generally, these regulations are applicable in railroad offices, shops and other fixed work places. There are three principal exceptions to the rule.***
>
> ***
>
> Third, the OSHA regulations would not apply to ladders, platforms, and other surfaces on signal masts, catenary systems, railroad bridges, turntables, and similar structures or to walkways beside the tracks in yards or along the right-of-way. These are areas which are so much a part of the operating environment that they must be regulated by the agency with primary responsibility for railroad safety." (43 Fed.Reg. 10587 (1978).)

The OSHA regulations referred to in the above passage require the use of railings, toeboards and hole covers to be placed over or around an opening in a floor or wall surface. (See 29 C.F.R. §1910.23 (1991).) Based on the policy statement, these OSHA regulations are not applicable to railroad bridges. *Velasquez*, 734 F.2d at 218.

However, as noted above, the fall-protection regulations at issue in this case are included in OSHA's construction industry regulations. The Railroad Administration addressed separately the applicability of OSHA construction regulations. It is unclear from this section of the policy statement whether the Railroad Administration intended to displace OSHA fall-protection regulations. Specifically, the Railroad Administration stated:

> "To the extent that hazardous construction working conditions do not fall within [the Railroad Administration's] exercise of authority relating to the safety of railroad operations, the OSHA standards apply according to their terms in the railroad industry." (43 Fed.Reg. 10589 (1978).)

This section is ambiguous in that it is not clear which "hazardous construction working conditions" are within the Railroad Administration's exercise of exclusive authority.

When construing an administrative regulation, "'a court must necessarily look to the administrative construction of the regulation if the meaning of the words used is in doubt. ***[T]he ultimate criterion is the administrative interpretation, which becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation.'" (*Udall v. Tallman* (1965), 380 U.S. 1, 16-17, 13 L.Ed.2d 616, 625, 85 S.Ct. 792, 801, quoting *Bowles v. Seminole Rock & Sand Co.* (1945), 325 U.S. 410, 413-14, 89 L.Ed. 1700, 1702, 65 S.Ct. 1215, 1217.) With this principle in mind, it is significant to note that the Railroad Administration does not interpret its policy statement as preempting OSHA from enforcing the fall-protection regulations on railroad bridges.

In 1991, the Railroad Administration issued a notice of proposed rulemaking in which the agency announced its intent to promulgate fall-protection regulations substantially similar to the OSHA regulations at issue here. (See 56 Fed.Reg. 3434 (proposed Jan. 30, 1991).) In the jurisdictional background section of the 1991 notice, the Railroad Administration quoted the "walking-working surface" section of the policy statement and stated:

> "[The Railroad Administration] intended to displace OSHA regulations with respect to the surfaces on bridges, *i.e.*, track structures, but *did not intend to prevent OSHA from exercising its more general responsibilities for the safety of railroad workers with respect to fall protection and respiratory equipment."* (Emphasis added.) (56 Fed.Reg. 3435 (proposed Jan. 30, 1991).)

This interpretation of the policy statement indicates that the Railroad Administration itself believes OSHA had jurisdiction over the working conditions at issue in this case. Because we are construing a Railroad Administration regulation, this interpretation is controlling "'unless it is plainly erroneous or inconsistent with the regulation.'" *Udall*, 380 U.S. at 16-17, 13 L.Ed.2d at 625, 85 S.Ct. at 801, quoting *Bowles*, 325 U.S. at 414, 89 L.Ed.2d at 1702, 65 S.Ct. at 1217.

Defendant contends that the above-quoted Railroad Administration interpretation of the policy statement is not controlling because it is inconsistent with the clear language of the 1978 policy statement. Defendant argues that the Railroad Administration's 1991 interpretation provides nothing more than an attempt to retroactively revise the Railroad Administration's prior statement. It is clear, as defendant points out, that the 1978

policy statement intended to displace OSHA regulations from "railroad operations." What is unclear, however, is whether the use of safety nets and other fall-protection devices on railroad bridges impacts upon "railroad operations." We note that the policy statement is sufficiently ambiguous to support either interpretation. Indeed, the Railroad Administration recognized such ambiguity when it stated:

> "[T]o the extent matters addressed by the OSHA regulations are connected with or relate to railroad operations and may interact with or create operational hazards, it may be necessary for [the Railroad Administration] and OSHA to consult concerning the interpretation or modification of such standards. As the primary regulatory agency concerned with railroad safety, [the Railroad Administration] will not hesitate to adopt its own standards to assure a safe environment for railroad operations and to promote regulatory consistency." (43 Fed.Reg. 10587 (1978).)

Moreover, the policy statement was a statement of general principle, rather than a definitive declaration. 43 Fed.Reg. 10587 (1978).

The Railroad Administration addressed this ambiguity again in the 1991 notice of proposed rulemaking when it stated:

> "[T]hese distinctions [between bridge surfaces and fall protection] have proved confusing to the regulated community, railroad employees, inspectors, and ***adjudicatory bodies. [The Railroad Administration] has recently received a number of legal memoranda addressing these issues from railroads and railroad associations: all of these evidence this confusion." (56 Fed.Reg. at 3435 (proposed Jan. 30, 1991).)

In fact, defendant is one of the railroads referred to by the Railroad Administration as having submitted legal memoranda. 56 Fed.Reg. at 3436 (proposed Jan. 30, 1991).

Based on the above excerpts from both the 1978 and the 1991 Railroad Administration pronouncements, we are unable to conclude that the Railroad Administration has unambiguously preempted OSHA from regulating the use of fall-protection equipment on railroad bridges. As the policy statement is subject to two competing interpretations which are equally reasonable, we believe the most appropriate interpretation is that which the Railroad Administration itself has adopted. Therefore, we hold that the OSHA fall-protection regulations applied to the present case.

We note that the *Velasquez* decision on which defendant and the appellate court relied is distinguishable. In *Velasquez*, the plaintiff fell through an opening in the track on a railroad bridge and landed on a creek bed *nine feet* below. The plaintiff in that case introduced evidence that "under OSHA regulations, rope barricades and a toeboard around the perimeter of the opening would have been appropriate measures." (*Velasquez*, 734 F.2d at 218.) From these facts it is clear that the plaintiff in *Velasquez* attempted to introduce evidence of OSHA "walking-working surface" regulations. The OSHA safety-net regulations did not apply because the plaintiff in *Velasquez* was substantially below the 25-foot threshold level at which a safety net is required.

In *dicta*, the *Velasquez* court noted that OSHA's construction regulations did not apply because the policy statement displaced those regulations for construction work done on railroad bridges.

(*Velasquez*, 734 F.2d at 218 n.1.) However, at the time of its decision, the *Velasquez* court did not have the benefit of the Railroad Administration's 1991 interpretation of the policy statement. Because the Railroad Administration's 1991 notice of proposed rulemaking contains an interpretation which is not plainly erroneous, we will follow the Railroad Administration's interpretation rather than that of the *Velasquez* court. (*Udall*, 380 U.S. at 16-17, 13 L.Ed.2d at 625, 85 S.Ct. at 801.) In light of the Railroad Administration's 1991 interpretation of its own regulations, and the fact that Velasquez is distinguishable, we need not consider the question of whether Illinois courts are bound to follow the decisions of lower Federal courts when interpreting Federal law

We are also aware that in 1988, Congress passed the Rail Safety Improvement Act of 1988, which requires the Railroad Administration to promulgate regulations "for the safety of maintenance-of-way employees, including standards for bridge safety equipment, such as nets, walkways, handrails, and safety lines." (45 U.S.C. §431(n) (1988).) Defendant argues that this provision indicates that Congress believed that the Railroad Administration is the most appropriate agency to regulate employee safety on railroad bridges. Clearly, when the Railroad Administration issues its final regulations on this matter or indicates that the working condition should go unregulated, OSHA will be displaced from enforcing its corresponding regulations. However, the 1988 statute does not answer the question of whether, in 1984, the Railroad Administration had already made such a determination relative to this working condition. Moreover, we do not believe Congress intended this statute to displace OSHA regulations which would otherwise apply.

Therefore, we find the Rail Safety Improvement Act of 1988 does not resolve the dispute in this case.

For the foregoing reasons, we reverse the judgment of the appellate court and remand to that court for consideration of the remaining issues raised by defendant's appeal.

Reversed and remanded.

JUSTICE BILANDIC, dissenting:

I respectfully dissent because, in my opinion, under the facts of this case, the Federal Railroad Administration (Railroad Administration) has preempted the application of the Federal Occupational Safety and Health Administration (OSHA) "fall-protection" regulations.

As the majority correctly notes, the Railroad Administration is the primary agency responsible for regulating the railroad industry. Congress enacted the Federal Railroad Safety Act of 1970 (45 U.S.C. §421 *et seq.* (1970)) for the purpose of providing "comprehensive and uniform safety regulations in all areas of railroad operations." (*Chicago Transit Authority v. Flohr* (7th Cir. 1977), 570 F.2d 1305, 1308.) Under that act, the Railroad Administration is expressly given the authority and responsibility to prescribe all rules, regulations and standards necessary for promoting safety in all areas of railroad operations. 45 U.S.C. §431 (1970).

The "fall-protection" regulations at issue here were enacted by OSHA. It is undisputed that OSHA is *not* the agency primarily responsible for regulating safety concerns within the

railroad industry. Instead, OSHA, pursuant to the Occupational Safety and Health Act of 1970 (29 U.S.C. §651 *et seq.* (1970)), has general authority to regulate working conditions that affect the occupational safety and health of employees in general, regardless of the industry in which they are employed. Thus, under the Federal regulatory scheme established by Congress, OSHA has generic authority to promulgate safety standards for industries affecting interstate commerce while the Railroad Administration has specific authority to promulgate safety standards for the railroad industry.

Obviously, this scheme created the potential for dual regulation by both the Railroad Administration and OSHA with respect to health and safety concerns in the railroad industry. Congress expressly acknowledged this potential problem and made provisions to avoid such overlapping regulation. Section 4(b)(1) of the Occupational Safety and Health Act states that its terms *will not apply* to working conditions as to which another Federal agency "exercise[s] statutory authority to prescribe or enforce standards or regulations affecting occupational safety or health." (29 U.S.C. §653(b)(1) (1988).) Thus, by the very terms of the Occupational Safety and Health Act, OSHA regulations such as the "fall-protection" regulations at issue here are preempted when another Federal agency, such as the Railroad Administration, exercises statutory authority over a particular working condition.

In 1978, the Railroad Administration issued a policy statement in which it clearly and unequivocally stated its intent to exercise its statutory authority over "the safety of railroad operations." (43 Fed.Reg. 10589 (1978).) In that statement, the

Railroad Administration thoroughly condemned "piecemeal regulation of individual hazards in [railroad operations] by any other agency of government," calling such a practice "disruptive and contrary to the public interest." 43 Fed.Reg. 10586 (1978).

To avoid such piecemeal regulation, the Railroad Administration's policy statement specifically indicated over which railroad working conditions it was exercising its authority and thereby displacing any OSHA regulations that might otherwise apply. Among those aspects of the railroad industry over which the Railroad Administration asserted its authority was the precise working condition at issue in this case, that is, working conditions on railroad bridges. The 1978 policy statement provided, *inter alia*, that "OSHA regulations would not apply to ladders, platforms and other surfaces on *** railroad bridges." (43 Fed.Reg. 10587 (1978).) The Railroad Administration stated that it was asserting exclusive jurisdiction over this aspect of the industry because "[t}hese are areas which are so much a part of the operating environment that they must be regulated by the agency with primary responsibility for railroad safety." 43 Fed.Reg. 10587 (1978).

The majority concedes that this policy statement was sufficient to preempt OSHA's jurisdiction over some aspects of the railroad industry. (151 Ill.2d at 332.) However, the majority concludes that the policy statement is "ambiguous" as to whether the OSHA "fall-protection" regulations are displaced. In my view, the majority ignores the clear language of the policy statement.

At the core of the majority's finding of ambiguity is the fact that the "fall-protection" regulations are included as part of OSHA's "construction industry regulations." The majority notes that the 1978 policy statement separately addressed the applicability of the OSHA "construction industry regulations," stating:

> "'To the extent that hazardous construction working conditions do not fall within [the Railroad Administration's] exercise of authority relating to the safety of railroad operations, the OSHA standards apply according to their terms in the railroad industry.'" (151 Ill.2d at 300, quoting 43 Fed.Reg. 10589 (1978).)

The majority determines that this section makes the 1978 policy statement ambiguous because "it is not clear which 'hazardous construction working conditions' are within the Railroad Administration's exercise of exclusive authority." (151 Ill.2d at 330-31.) I believe that the majority's conclusion that the 1978 policy statement is ambiguous is patently erroneous.

The 1978 policy statement clearly mandates that OSHA's "construction industry regulations" apply to a particular working condition in the railroad industry *only if* the Railroad Administration has not exercised its authority over that condition. In this case, the Railroad Administration *has* in fact exercised its exclusive authority over the hazardous working condition at issue. The 1978 policy statement clearly states that the Railroad Administration is exercising its authority, to the exclusion of OSHA, over working conditions on *railroad bridges*. Thus, working conditions on railroad bridges clearly constitute a "hazardous construction working condition" over which the Railroad Administration has exercised its authority and displaced

the authority of OSHA. The OSHA "construction industry regulations," including the "fall-protection" regulations, are therefore inapplicable to working conditions on railroad bridges. There is no ambiguity on this point; the policy statement specifically preempts OSHA from regulating work on railroad bridges.

Because the policy statement unambiguously places the regulation of safety and health concerns of workers on railroad bridges exclusively within the province of the Railroad Administration, it must be applied according to its terms. There is no justification for looking to outside sources to discern the meaning of an unambiguous statement. (2A N. Singer, Sutherland on Statutory Construction §46.04 (5th Ed. 1992).) The majority ignores this principle and looks to extrinsic sources to "interpret" the 1978 policy statement. Moreover, the outside source upon which the majority ultimately relies is not persuasive. The majority seeks to discern the intent behind the 1978 statement by looking to language contained in the preamble to a "notice of proposed rulemaking" issued by the Railroad Administration in *1991*. Initially, I must seriously question the usefulness of an "interpretation" that is issued *13* years *after* the document it purports to interpret. (See *Colt Industries, Inc. v. United States* (D.C. Cir. 1989), 880 F.2d 1311, 1313.) An administrative interpretation is not entitled to controlling weight when the interpretation is not relatively contemporaneous with the statement being interpreted. (2B N. Singer, Sutherland on Statutory Construction §49.08 (5th Ed. 1992); see also *Drew v. Lawrimore* (D.C. S.C. 1966), 257 F.Supp. 659, 669-70.) I agree with the defendant that the Railroad Administration's 1991 "interpretation" constitutes nothing more than an attempt to retroactively revise

their prior statement. Such "retroactive history" is worthy of little or no weight. (See *Colt Industries*, 880 F.2d at 1313 (*subsequent* legislative history is entitled to little weight).) Moreover, I would point out that the 1991 "interpretation" was issued over seven years after the plaintiff's accident and over one year after the trial in this cause was completed.

Even more importantly, the 1991 "interpretation" is contrary to the clear mandate of the Railroad Administration's 1978 policy statement regarding OSHA's authority over railroad bridges. The plain language of the 1978 statement preempts OSHA's jurisdiction over working conditions on railroad bridges. The 1991 "interpretation" is in direct contravention of that mandate. As the majority notes, an administrative interpretation of a regulation is not controlling where it is inconsistent with the plain language of the regulation itself. (151 Ill.2d at 332.) Thus, the 1991 "interpretation" of the 1978 policy statement is both untimely and directly contradicted by the plain language of the statement itself. Such an "interpretation" should not be accorded any significance by this court.

In addition to being in violation of basic rules of construction, the majority's holding is in error because it creates the exact problem the Railroad Administration sought to avoid when it issued the 1978 policy statement, namely, overlapping regulation of the same occupational hazard by two governmental agencies. That this is the result is easily illustrated. According to the majority, the 1978 policy statement *did* preempt OSHA's "walking-working surfaces" regulations, but did *not* preempt OSHA's "fall-protection" regulations. It is quite evident,

however, that these two sets of regulations are aimed at the same occupational hazard.

OSHA's "walking-working surfaces" regulations require the use of railings, toeboards and hole covers over and around floor openings. According to the majority, then, the Railroad Administration has the sole authority to determine whether *these* safety devices are needed on railroad bridges. OSHA's "fall-protection" regulations require, for workplaces situated more than 25 feet above the ground, the use of safety nets or other devices intended to prevent workers from falling. The majority thus concludes that the Railroad Administration does not have the sole authority to determine whether *these* safety devices are needed on railroad bridges. Rather, OSHA has the authority to determine the necessity of such safety devices.

It cannot be disputed that railings, toeboards and hole covers over and around floor openings, and safety nets underneath a floor opening, are aimed at protecting workers from the same hazard, namely, that of *falling*. Thus, according to the majority, the Railroad Administration *intended* that the *same* working hazard be regulated by two separate agencies, OSHA and the Railroad Administration. This result directly conflicts with the Railroad Administration's express condemnation of "piecemeal regulation of individual hazards" by more than one governmental agency. (43 Fed.Reg. 10586 (1978).) This result is also illogical. There is no rational reason for the Railroad Administration to distinguish between the "walking-working surfaces" regulations and the "fall-protection" regulations, as they pertain to railroad bridges. To say that the Railroad Administration believed that the use of *railings and holecovers* on

railroad bridges was "so much a part of the [railroad] operating environment" (43 Fed.Reg. 10587 (1978)) that they must be regulated by the Railroad Administration, but that the use of *safety nets* on railroad bridges is not, is absurd. Clearly, the Railroad Administration did not intend such an illogical result. The majority's decision, however, results in just that—piecemeal regulation of a single hazard by two separate agencies.

The majority's decision is also in conflict with clear Federal precedent on this precise issue. *Velasquez v. Southern Pacific Transportation Co.* (5th Cir. 1984), 734 F.2d 216, is materially indistinguishable from the instant case. In *Velasquez*, the plaintiff, a railroad worker participating in repair work on a railroad bridge, fell through an opening in the bridge which the workers had created so that they could reach the area underneath the track. The plaintiff filed an action under FELA against his railroad-employer. At trial, the plaintiff's expert was allowed to testify that OSHA regulations applied to the defendant railroad and that, under OSHA, rope barricades and toeboards around the opening would have been appropriate. The judgment entered in the plaintiff's favor was subsequently reversed by the Fifth Circuit Court of Appeals, which held that the reference to the OSHA regulations was reversible error. *Velasquez*, 734 F.2d at 218.

The *Velasquez* court determined that the admission of the OSHA regulations was improper because the Railroad Administration specifically preempted those regulations in the 1978 policy statement. The Court of Appeals noted that the policy statement clearly provided that OSHA regulations would not apply to railroad bridges. The court determined that the

Railroad Administration's assertion of jurisdiction over railroad bridges in the 1978 statement clearly preempted and displaced *both* the OSHA regulations requiring rope barricades and toeboards, *and* the OSHA "construction regulations." (*Velasquez*, 734 F.2d at 218.) Thus, *Velasquez* is clear precedent for the proposition that the OSHA "fall-protection" regulations were displaced by the 1978 policy statement. This court, when addressing a *federally created* cause of action, such as FELA, should accord, if not controlling weight, at least great deference to the decisions of lower Federal courts. See *Bowman v. Illinois Central R.R. Co.* (1957), 11 Ill.2d 186, 199-200.

I disagree with the majority's attempt to distinguish *Velasquez*. First, the majority asserts that *Velasquez* is distinguishable because the plaintiff in that case introduced only evidence of OSHA's "walking-working surfaces" regulations and *not* the "fall-protection" regulations at issue in this case. (151 Ill.2d at 333-34.) However, this distinction is without merit because the *Velasquez* court specifically held that OSHA's "construction regulations" were preempted by the 1978 policy statement. (*Velasquez*, 734 F.2d at 218.) Moreover, as I discussed previously, no reasoned basis for distinguishing between the "walking-working surfaces" regulations and the "fall-protection" regulations can be advanced in this case.

The majority also attempts to distinguish *Velasquez* on the ground that that court did not have the "benefit" of the Railroad Administration's 1991 "interpretation" of the 1978 statement. (151 Ill.2d at 334.) As noted, that "interpretation" is entitled to little or no weight because it conflicts with the express terms of the statement which it purports to interpret. Thus, neither of the

arguments proffered by the majority provide a legitimate basis for distinguishing *Velasquez*.

In conclusion, I believe that the interpretation of the 1978 Railroad Administration policy statement applied by the majority is clearly erroneous. I would uphold the judgment of the appellate court holding that the 1978 statement preempted the OSHA "fall-protection" regulations in this case and that the admission of those regulations at trial constituted reversible error. For these reasons, I dissent.

JUSTICE HEIPLE joins in this dissent.

APPENDIX B

ILLINOIS SUPREME COURT
JULEANN HORNYAK, CLERK
SUPREME COURT BUILDING
SPRINGFIELD, ILL. 62706
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November 30, 1992

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No. 71783 - Tracy Templeton, appellant, v. Chicago and Northwestern Transportation Company, appellee. Appeal, Appellate Court, First District.

The Supreme Court today DENIED the petition for rehearing in the above entitled cause.

The mandate of this Court will issue to the appropriate Appellate Court and/or Circuit Court or other agency on December 10, 1992.

APPENDIX C

APPELLATE COURT OF ILLINOIS
First District, Fifth Division

No. 1-90-0312
March 15, 1991

TRACY TEMPLETON, Plaintiff-Appellee,
v.
CHICAGO AND NORTH WESTERN
TRANSPORTATION COMPANY, Defendant-Appellant.

JUSTICE MURRAY delivered the opinion of the court:

The plaintiff, Tracy Templeton (Templeton), was an employee of the defendant, Chicago and North Western Transportation Company (North Western). On January 27, 1984, Templeton was severely injured when he fell 31 feet through an opening in the deck of a railroad bridge to the ice below. At the time he was injured, Templeton was working on North Western's bridge spanning the Illinois River near Pekin, Illinois. Templeton brought a negligence action pursuant to the Federal Employers' Liability Act (FELA), (45 U.S.C. §51 *et seq.* (1988)) in which plaintiff alleged that he was injured as a result of the negligence of North Western. A trial by jury resulted in a verdict for the plaintiff in the amount of $3.5 million after a reduction for the jury's finding that the plaintiff was 14% contributorily negligent. North Western appeals from the final judgment entered on the verdict.

Templeton was 27 years of age at the time of his accident on January 27, 1984. He began employment with North Western in

1980. He worked both as a painter and a carpenter on the Bridge and Building (B&B) crew. The B&B department was responsible for the construction and maintenance of bridges.

The redecking project to which Templeton was assigned in October 1983 required the B&B crew to replace all of the ties on the Illinois River bridge in successive 40-foot sections. By January 27, 1984, the date of Templeton's accident, the redecking had been completed, and the B&B crew was working on a fixed surface. However, the railroad track still had to be realigned in order to permit trains to again travel over the bridge at nominal operating speeds. Track realignment required access to the underside of the bridge, which was accomplished by temporarily removing individual sections of the walkway grating. Realignment work was being performed throughout the week of Templeton's accident.

Templeton's accident occurred on the bridge surface at about 10 a.m. He was assigned to remove bolts called "double grips" with an air impact wrench. Meanwhile, other employees removed a single, 30 foot by 15 inch section of walkway grating so that a scaffold could be lowered through the opening they had created. Once the scaffold was in place, another employee would use it as a platform underneath the bridge to assist in retightening bolts which anchored the track to the ties.

The narrow opening in the bridge deck was not barricaded while the employees raised the scaffold. Templeton was not wearing a safety line at the time of his accident. North Western's safety policy did not require a restraining device to be used in all facets of bridge work.

At the time of the accident, Templeton was continuing to remove "double grips" on the west side of the bridge. His air impact wrench was connected to an air compressor by a hose approximately 100 feet long. His foreman thought Templeton was getting too far ahead of the rest of the crew and called him back. As Templeton started to walk back toward the rest of the crew, the hose on the air impact wrench hung up on one of the "double grips."

No one knows exactly what happened next. No one saw what caused Templeton to fall. North Western alleges the last time anyone saw Templeton, he was moving south, but looking north, about five or six feet north of the narrow opening in the walkway. Templeton alleges the first notice any of the co-workers had of the fall was a scream at which time they each looked around and saw the plaintiff falling through the opening in the deck with his hand slightly lower than his feet and the air impact wrench still in his hands.

Templeton had no recollection of the events of the occurrence and could not say what happened or why or how he fell. A co-worker testified that he saw the plaintiff bounce off the ice below, slide ten feet, then try unsuccessfully to get up. In any event, Templeton landed on the ground adjacent to the river and some 31 feet below the bridge. He was taken to the hospital by an emergency rescue squad. Templeton has suffered severe physical injuries as a result of his fall. The testimony conflicts as to the extent of brain damage, if any, sustained by Templeton.

North Western raises the following issues on appeal: (1) whether the trial court erred in permitting plaintiff to

introduce evidence that North Western allegedly failed to comply with Occupational Safety and Health Administration (OSHA) regulations; (2) whether the trial court erred in instructing the jury that such an alleged violation could be considered as evidence of railroad negligence; (3) whether the trial court erred in permitting plaintiff to introduce evidence of previous employee accidents on other North Western bridges; (4) whether the trial court erred in not ordering a new trial when it learned that the jury surreptitiously brought extrinsic evidence into jury deliberations; and (5) whether the size of the verdict was excessive.

In its most decisive among the five alleged errors, North Western argues that the trial court erred in instructing the jury that a violation of an OSHA regulation could be considered as proof of North Western's negligence. OSHA regulations are statutorily created working conditions based on the federally enacted Occupational Safety and Health Act of 1970. (OSH Act.) (29 U.S.C. §651 *et seq.* (1970)). It is North Western's contention that OSHA is inapplicable to a railroad employee such as Templeton.

Railroad workers do occupy a somewhat different status than the average American worker whether he is a fireman, oiler, engineer or whatever. The rights and responsibilities of the railroad worker injured during his employment are basically determined by the FELA (45 U.S.C. §51, *et seq.* (1908)) and Federal decisions construing that act. (*Norfolk & Western Ry. Co. v. Liepelt* (1980), 444 U.S. 490, 62 L.Ed.2d 689, 100 S.Ct. 755.) The FELA allows suits involving injuries to railroad men

to be filed in either State or Federal courts. 45 U.S.C. §56 (1948).

At trial testimony was introduced that certain safety standards, including OSHA standards, required nets or safety belts whenever a worker was working higher than 25 feet above ground. The trial court also gave the jury an instruction embodying the OSHA catch net regulation.

The nub of North Western's argument concerns the testimony of the absence of a safety net and safety belt and the judge's instruction that the jury could consider OSHA regulations in its consideration of the issue of North Western's negligence.

In 1970 Congress enacted the Federal Railroad Safety Act (FRSA). (45 U.S.C. §421 *et seq.* (1970)). The FRSA contemplated a comprehensive and uniform set of safety regulations in all areas of railroad operations. (*Chicago Transit Authority v. Flohr* (7th Cir. 1977), 570 F.2d 1305.) The United States Secretary of Transportation is charged with the duty to prescribe all necessary rules, regulations ordered and standards for all areas of railroad safety. (45 U.S.C. §431 (1970).) The Secretary of Transportation has delegated these responsibilities to the Administrator of the Federal Railroad Administration (FRA), a unit of the Department of Transportation. (49 C.F.R. §1.49(m) (1988).) Further, North Western argues that the FRA has exclusive jurisdiction over working conditions pertaining to railroad bridges and the issue of whether or not safety nets and safety belts are required in bridge redecking work.

North Western contends that the FRSA and not OSHA controls the safety standards applicable to the work Templeton was engaged in, *i.e.*, "redecking of the bridge's railway bed."

Plaintiff asserted that North Western had been negligent in violating regulations promulgated by OSHA. Plaintiff argues that the OSHA requirements of nets and safety belts are not preempted by the FRSA. The basis of this argument is that OSHA regulations are only preempted by the FRSA when there is an exercise of authority over the same working conditions regulated by OSHA.

The real legal issue in respect to safety regulations was whether the FRA actually exercised its jurisdiction over the railroad deck work, and if not, does the FRSA preclude the application of OSHA safety rules as evidence of a railroad's negligence in this case.

In this case, at the time of Templeton's injury, January 1984, there was no clear cut FRA regulation requiring nets or safety belts to be provided for workers on railroad bridges. In his 74-page brief plus appendix the plaintiff points to none. Alternatively, North Western points to numerous sections of the Federal Register indicating that no regulations requiring nets and/or safety belts were ever adopted by the FRA. Finally, the fact that there was no such a requirement is disclosed in a proposed notice of rule published in the Federal Register by the FRA (56 Fed.Reg. 3434-41 (1991)) and brought to this court's attention just prior to oral argument. Although the plaintiff has emphasized certain portions of the notice by underlining proposed

safety rules for railroads, counsel failed to note the following, also contained in the notice:

> "43 FR 10585 Both courts and the Occupation Safety and Health Review Commission have held that the assertion of authority in a policy statement constitutes an exercise of FRA's statutory authority under the rail safety laws sufficient to displace OSHA standards pursuant to section 4(b)(1) of the OSH Act with respect to health and safety issues intrinsic to 'railroad operation.' *Velasquez v. Southern Pacific Transp. Co.*, 734 F.2d 216, 218 (5th Cir. 1984); *Southern Pacific Transp. Co. v. Usery*, 539 F.2d 386 (5th Cir. 1976), *cert. denied*, 434 U.S. 874 (1977); *Consolidated Rail Corp.*, 10 OSHC (BNA) 1577 (1982)." 56 Fed.Reg. 3434, 3435 (1991).

In 1978 the FRA issued a statement to the effect that OSHA regulations would not apply to, among other aspects of the railroad industry, "railroad bridges." (43 Fed.Reg. 10587 (1978).) The railroad industry points to this declaration as indicative of the vesting of exclusive jurisdiction over railroad bridges in the FRA.

Finally, North Western points to a 1988 amendment to the FRSA in which it was specifically stated, "[t]he Secretary shall within one year after June 22, 1988, issue such rules, regulation orders and standards as may be necessary for the safety of maintenance-of-way employees, including standards for bridge safety equipment, such as nets, walkways, handrails and safety lines, ***." (45 U.S.C. §431(n) (1988).) This court could find no Federal case where a Federal court interpreted the FRSA as having either directly or inferentially held that the FRA did not intend to preempt OSHA regulations. North Western has cited a

number of cases to the contrary. They are cited in the notice published by the FRA referred to above.

Preemption is viewed somewhat differently when applied to the question of preemption of State regulations by a Federal statute. That assumption is that historical police powers of a state are not superseded by a Federal act unless that is the clear intention of congress. (*Ray v. Atlantic Richfield Co.* (1978), 435 U.S. 151, 55 L.Ed.2d 179, 98 S.Ct. 988.) Where a particular area is not totally foreclosed to the State, the State may regulate in certain situations. In the FRSA, congress made explicit declaration that no State rail safety regulations shall remain valid after the promulgation of a Federal regulation covering the same subject matter as that covered by the State law. (45 U.S.C. §434 (1970).) In *Liepelt v. Norfolk & Western Ry. Co.* (1978), 62 Ill.App.3d 653, 378 N.E.2d 1232, *rev'd on other grounds*, (1980), 444 U.S. 490, 62 L.Ed.2d. 689, 100 S.Ct. 755, the trial court held that the Federal act did not preempt an Indiana safety statute relating to railroads. We note, however, that the *Liepelt* court only considered the narrow issue of whether the Indiana Switch Light Act and Standard covered the same subject matter. *Liepelt*, 62 Ill.App.3d at 660, 378 N.E.2d at 1239.

The able trial judge was obviously attempting to follow Illinois law on the subject. Yet, both the trial court and this court are compelled to follow Federal decisions in determining rights and obligations created by laws enacted by the U.S. congress. *Bowman v. Illinois Central R.R. Co.* (1957), 11 Ill.2d 186, 142 N.E.2d 104.

North Western cites the case of *Velasquez v. Southern Pacific Transportation Co.* (5th Cir. 1984), 734 F.2d 216, in support of their proposition. The *Velasquez* case involved a railroad worker who was injured while working on a railroad bridge. The railroad workers had to remove a portion of the wooden walkway along the track so they could reach the area underneath the track. Velasquez slipped and fell through this opening, landing on the creek bed nine feet below. Templeton also involved a railroad worker injured in a fall. Templeton's attorneys made a valiant attempt to distinguish his case from the *Velasquez* case; however, *Velasquez* is precedent for the proposition that the trial court erred in admitting evidence of OSHA violations and instructing the jury they could consider such evidence on the issue of railroad negligence. *Velasquez v. Southern Pacific Pacific Transportation Co.* (5th Cir. 1984), 734 F.2d 216.

In *Velasquez* the court held that a policy statement constituted a sufficient exercise of statutory authority delegated to the FRA to displace OSHA standards. Templeton attempts to distinguish his situation from that of Velasquez by arguing that the accident in this case occurred when Templeton fell 31 feet off a bridge whereas Velasquez was working replacing a large beam supporting the track when he slipped and fell through the opening. The *Velasquez* court plainly and clearly held that an instruction to the effect that the jury could consider an OSHA violation on the issue of a railroad's negligence was reversible error. The court plainly stated, "We agree with Southern Pacific's argument that OSHA standards do not apply to the walkway along the tracks, or railroad bridges because they have

been displaced by a Federal Railroad Administration (FRA) policy statement." *Velasquez*, 734 F.2d at 218.

The issue of whether or not the admission of the evidence concerning violations was harmless was not addressed in *Velasquez*. We do not address it here. It may well be that such evidence is admissible under a different theory, *i.e.*, failure to provide a safe work place.

In *Missouri Pacific R.R. Co. v. Railroad Comm'n of Texas* (5th Cir. 1987), 833 F.2d 570, the court considered the question of whether the introduction of evidence of violations of certain State safety regulations was preempted by the FRSA policy statement. The court found, "[t]o hold as *Velasquez* did, that the FRSA policy statement prevented plaintiff from securing an instruction on OSHA regulations, does not control the issue of the exercise of FRA jurisdiction to the exclusion of state regulations." *Missouri Pacific R.R. Co. v. Railroad Comm'n of Texas* (5th Cir. 1987), 833 F.2d at 576 n.6.

Templeton also argues that the introduction of evidence concerning the OSHA violation and the instruction was at best harmless. Yet as the *Velasquez* court indicates, the error created "'a substantial and ineradicable doubt as to whether the jury was properly guided in its deliberations'" and required a reversal. *Velasquez v. Southern Pacific Transportation Co.* (5th Cir. 1984), 734 F.2d at 219 quoting *Miller v. Universal City Studios, Inc.* (5th Cir. 1981), 650 F.2d 1365, 1372.

We believe the trial judge attempted to follow the spirit of both State and Federal law, yet we are compelled to follow the

aforecited Federal cases. We reverse and remand the matter for a new trial based on the narrow issue of the erroneous instructions. In light of our conclusion we do not reach the other issues raised by the parties.

REVERSED AND REMANDED.

LORENZ, P.J., and McNULTY, J., concur.

APPENDIX D

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION

Judge Paddy H. McNamara

No. 85 L 28835
October 26, 1989

TRACY TEMPLETON, Plaintiff,
v.
CHICAGO AND NORTH WESTERN
TRANSPORTATION COMPANY, Defendant.

"We, the jury, find for the plaintiff and against the defendant and further find the following:"

First without taking into consideration the question of reduction of damages due to the negligence of the plaintiff, if any, or failure to mitigate damages, suffered by the plaintiff as a proximate result of the occurrence in question is $4,069,768.00 itemized as follows:

The disability & disfigurement resulting from the injuries	$1,500,000.00.
The pain and suffering experienced and reasonably certain to be experienced in the future as a result of the injuries . . .	$1,899,028.00.

The present cash value of the reasonable expenses of medical care, treatment & services reasonably certain to be received in the future	$5,740.00.
The value of earnings lost and the present cash value of the earnings reasonably certain to be lost in the future	$665,000.00
Total	$4,069,768.00

Second: Assuming that 100% represents the total combined negligence of the plaintiff & of the defendant we find that the percentage of negligence that was a proximate cause of plaintiff's injury attributable solely to the plaintiff is 14 percent (%).

Third: After reducing the total damages sustained by the plaintiff by the percentage of negligence attributable to the plaintiff, we assess plaintiff's recoverable damages before consideration of mitigation in the sum of $3,500,000.00.

Fourth: We find that plaintiff has failed to mitigate his damages in the amount of $-0-.

Fifth: Plaintiff's total recoverable damages after all reductions are $3,500,000.00.

Ordered judgment for plaintiff in the amount of $3,500,000.00 and against the defendant on verdict.

APPENDIX E

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION

No. 85 L 28835
January 8, 1990

TRACY TEMPLETON, Plaintiff,
v.
CHICAGO AND NORTH WESTERN
TRANSPORTATION COMPANY, Defendant.

ORDER

This matter coming on for post-trial motions, argument having been heard and recorded,

It is hereby ordered that both plaintiff's and defendant's post-trial motions are denied.

JUDGE PADDY H. McNAMARA
January 8, 1990
Circuit Court - 236

APPENDIX F

Article VI(2), United States Constitution:

> "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

Amendment 14, United States Constitution:

> "...No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The Federal Employers' Liability Act, 45 U.S.C. §51, *et seq.*:

> 45 U.S.C. §51 (1908) provides in pertinent part:
>
> "Every common carrier by railroad...shall be liable in damages to any person suffering injury while he is employed by such carrier...for such injury or death resulting in whole or in part from the negligence of any of the officers, agents or employees of such carrier...."
>
> 45 U.S.C. §53 (1908) provides in pertinent part:
>
> "In all actions...brought against any such common carrier by railroad...to recover damages for personal injuries to an employee...the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee...."

The Federal Railroad Safety Act, 45 U.S.C. §421, *et seq.*:

45 U.S.C. §431 (1970) provides in pertinent part:

"(a) The Secretary of Transportation (hereafter in this subchapter referred to as the "Secretary") shall (1) prescribe, as necessary, appropriate rules, regulations, orders, and standards for all areas of railroad safety supplementing provisions of law and regulations in effect on October 16, 1970, and (2) conduct, as necessary, research, development, testing, evaluation, and training for all areas of railroad safety."

....

"(e) The Secretary shall issue initial railroad safety rules, regulations, orders, and standards under this subchapter based upon existing safety data and standards, not later than one year after October 16, 1970. The Secretary shall review and, after hearing in accordance with subsection (b) of this section, revise such rules, regulations, orders, and standards as necessary."

45 U.S.C. §431 (1988) provides in pertinent part:

"(n) Maintenance-of-way operations

The Secretary shall, within one year after June 22, 1988, issue such rules, regulations, orders, and standards as may be necessary for the safety of maintenance-of-way employees, including standards for bridge safety equipment, such as nets, walkways, handrails, and safety lines, and requirements relating to instances when boats shall be used."

The Occupational Safety and Health Act, 29 U.S.C. §651 *et seq.*:

29 U.S.C. §653 (1970) provides in pertinent part:

"(b)(1) Nothing in this chapter [Occupational Safety and Health Act] shall apply to working conditions of employees with respect to which other Federal

agencies, and State agencies acting under section 2021 of Title 42, exercise statutory authority to prescribe or enforce standards or regulations affecting occupational safety or health."

....

"(b)(4) Nothing in this chapter shall be construed to supersede or in any manner affect any workman's compensation law or to enlarge or diminish or affect in any other manner the common law or statutory rights, duties or liabilities of employers and employees under any law with respect to injuries, diseases, or death of employees arising out of, or in the course of, employment."

APPENDIX G

29 C.F.R. PART 1926 - SAFETY AND HEALTH REGULATIONS FOR CONSTRUCTION

1926.104 — Safety belts, lifelines, and lanyards

(a) Lifelines, safety belts, and lanyards shall be used only for employee safeguarding. Any lifeline, safety belt, or lanyard actually subjected to in-service loading, as distinguished from static load testing, shall be immediately removed from service and shall not be used again for employee safeguarding.

(b) Lifelines shall be secured above the point of operation to an anchorage or structural member capable of supporting a minimum dead weight of 5,400 pounds.

(c) Lifelines used on rock-scaling operations, or in areas where the lifeline may be subjected to cutting or abrasion, shall be a minimum of ⅞-inch wire core manila rope. For all other lifeline applications, a minimum of ¾-inch manila or equivalent, with a minimum breaking strength of 5,400 pounds, shall be used.

(d) Safety belt lanyard shall be a minimum of ½-inch nylon, or equivalent, with a maximum length to provide for a fall of no greater than 6 feet. The rope shall have a nominal breaking strength of 5,400 pounds.

(e) All safety belt and lanyard hardware shall be drop forged or pressed steel, cadmium plated in accordance with type 1, Class B plating specified in Federal Specification QQ-P-6. Surface shall be smooth and free of sharp edges.

(f) All safety belt and lanyard hardware, except rivets, shall be capable of withstanding a tensile loading of 4,000 pounds without cracking, breaking, or taking a permanent deformation.

1926.105 — Safety nets

(a) Safety nets shall be provided when workplaces are more than 25 feet above the ground or water surface, or other surfaces where the use of ladders, scaffolds, catch platforms, temporary floors, safety lines, or safety belts is impractical.

(b) Where safety net protection is required by this part, operations shall not be undertaken until the net is in place and has been tested.

(c) (1) Nets shall extend 8 feet beyond the edge of the work surface where employees are exposed and shall be installed as close under the work surface as practical but in no case more than 25 feet below such work surface. Nets shall be hung with sufficient clearance to prevent user's contact with the surfaces or structures below. Such clearances shall be determined by impact load testing.

(2) It is intended that only one level of nets be required for bridge construction.

(d) The mesh size of nets shall not exceed 6 inches by 6 inches. All new nets shall meet accepted performance standards of 17,500 foot-pounds minimum impact resistance as determined and certified by the manufacturers, and shall bear a label of proof test. Edge ropes shall provide a minimum breaking strength of 5,000 pounds.

(e) Forged steel safety hooks or shackles shall be used to fasten the net to its supports.

(f) Connections between net panels shall develop the full strength of the net.

APPENDIX H

DEPARTMENT OF TRANSPORTATION
FEDERAL RAILROAD ADMINISTRATION
[49 CFR Part 221]
[Docket No. ROS-1, Notice 3]

RAILROAD OCCUPATIONAL SAFETY AND HEALTH STANDARDS; TERMINATION

Policy Statement

AGENCY: Federal Railroad Administration, DOT.

ACTION: Termination of rulemaking proceeding and issuance of policy statement.

SUMMARY: The Federal Railroad Administration (FRA) is withdrawing its notice of proposed rulemaking with respect to railroad occupational safety and health standards. FRA had determined that it should not attempt to regulate at this time in an area already covered by regulations issued by the Department of Labor (Labor). This termination notice also explains the respective jurisdiction of FRA and Labor in a policy statement.

EFFECTIVE DATE: This termination is effective March 14, 1978.

. . .

SUPPLEMENTARY INFORMATION: On July 15, 1976, the Federal Railroad Administration (FRA) published a notice of proposed rulemaking (41 FR 29153) concerning the issuance of railroad occupational safety and health standards under the authority of the Federal Railroad Safety Act of 1970 (84 Stat. 971; 45 U.S.C. 421 et seq.). The specific standards proposed in that proceeding, designated as Docket No. ROS-1, concerned

means of egress from buildings and structures, general environmental controls and fire protection. The requirements of the proposed standards, corresponded generally to those contained in subparts E, J and L of the Occupational Safety and Health Standards (29 CFR Part 1910) issued by the Occupational Safety and Health Administration of the Department of Labor (OSHA/DOL). After reviewing the comments submitted to this Docket, and on reconsideration of the proper role for FRA in the general area of occupational safety and health, the FRA has determined that the proposed standards should not be issued and that the proceeding in Docket No. ROS-1 should be terminated. This document terminates the rulemaking proceeding and issues a policy statement concerning the relationship between the respective jurisdictions of FRA and OSHA.

. . .

While the OSH Act has created, for the Secretary of Labor, a broad, general authority to regulate working conditions that affect the occupational safety and health of employees, it also recognized the existence of similar authority in other Federal agencies. Section 4(b)(1) of the OSH Act provides that the OSH Act shall not apply to working conditions as to which another Federal agency exercises statutory authority to prescribe or enforce standards or regulations affecting occupational safety or health.

The FRA has long been involved in and concerned with assuring that railroad employees, shippers and the general public are provided with safe transportation by rail. This involvement dates back to the late nineteenth century when FRA's predecessor agency, the Interstate Commerce Commission, was directed to enforce statutory provisions requiring the use of various safety

appliances on railroad cars and engines for the protection of employees and travelers (45 U.S.C. 1-7). ...

In order to further FRA's ability to respond effectively to the contemporary safety problems and hazards existing within the railroad industry, the Congress, in 1970, enacted the Federal Railroad Safety Act ("FRSA"). The FRSA authorized the Secretary of Transportation to exercise broad and general regulatory powers, as he deemed necessary, in all areas of railroad safety.

Given this longstanding FRA involvement in regulatory activities concerned with assuring both safe working conditions for railroad employees and safe rail transportation of persons and property, it was obvious that the working conditions of railroad employees were subject to potential dual regulation by the Secretary of Labor pursuant to his OSH Act authority. In order to effect the Congressional policy reflected in Section 4(b)(1) of the OSH Act, and thereby avoid unnecessary and inefficient duplication of Federal efforts in the area of railroad occupational safety and health, the FRA initiated a regulatory proceeding to develop specific FRA occupational safety and health standards which would preempt the Secretary of Labor from enforcing OSH Act standards applicable to the same working conditions. An advance notice of proposed rulemaking was published on March 7, 1975 (40 FR 10693) indicating FRA's intention to issue specific standards. A subsequent notice of proposed rulemaking published on July 15, 1976 (41 FR 29153) stated that FRA had decided to propose standards in three particular areas and to issue a comprehensive code of occupational safety and health standards specifically applicable to railroad employees. The applicability of

the standards which were to be included in this code was defined on a territorial basis rather than a specific hazard basis. The standards would apply to certain enumerated railroad workplaces, properties, facilities, structures, and equipment. Because of the complexity and magnitude of such an undertaking, it was anticipated that this code would be issued in an incremental fashion through several successive rulemaking proceedings. As with the initial specific three areas of regulation, the proposed FRA rules would be similar to those contained in several subparts of the OSHA standards.

Written comments in response to this proposal were received, and a public hearing was conducted. The FRA has reviewed not only these comments, but also the entire original concept as to the adoption of a comprehensive code of occupational safety and health standards for the railroad industry paralleling the existing OSHA regulations.

While the FRA is vested with broad authority in all areas of railroad safety, including those of an occupational nature, we believe it is important to determine the extent to which that authority can and should be exercised in order to assure an effective and coherent overall railroad safety program. To date, the majority of our efforts to assure continuing safety or to improve the present level of railroad safety has been concentrated in those areas of the railroad industry that are directly related to railroad operations—that is, the provision of a transportation service by rail. This is reflected throughout the existing FRA regulations which can be classified generally as those related to (1) track, roadbed, and associated devices and structures, (2) equipment and (3) human factors.

In these traditional areas of railroad safety, FRA has developed a special expertise which makes this agency uniquely qualified to play the primary role in the Federal Government's efforts to assure safe employment and places of employment for railroad employees engaged in activities related to railroad operations. ...

While the primary purpose of this notice is to inform all interested parties of the FRA's determination to terminate this rulemaking proceeding, the FRA believes that a more explicit discussion of the implications of this determination with respect to the existing jurisdictions of FRA and OSHA and the policy which will be utilized to guide future FRA actions in the occupational safety and health area is both necessary and in the public interest. It is hoped that this discussion will assist the courts and the Occupational Safety and Health Review Commission in understanding the extent to which FRA has exercised its statutory jurisdiction, the shape and organic nature of the FRA regulatory program, and the complementary role of OSHA in promoting safe and healthful working conditions for railroad employees.

POLICY CONCERNING EXERCISE OF STATUTORY AUTHORITY

A. INTRODUCTION

This policy statement will enumerate: (1) Those categories of working conditions and associated hazards with respect to which the agency is presently exercising its authority through the application of published standards or other mechanisms; (2) those working conditions and associated hazards with respect to which the agency has determined that regulation by FRA is not

appropriate at this time but which are so related to regulated conditions as to require close coordination with OSHA; and (3) other working conditions and associated hazards with respect to which FRA has no present plans to exercise jurisdiction. The purposes of this statement of policy are to assure the integrity of the regulatory program currently in place for the promotion of rail transportation safety by articulating its dimensions and to clarify the respective roles of FRA and OSHA in assuring the occupational safety and health of railroad employee.

. . .

As is reflected by the termination notice set forth above, FRA has decided to focus its resources and energies for the immediate future on the safety of railroad operations. As used herein, "railroad operations" refers to the movement of equipment over the rails. The term "safety" includes health-related aspects of railroad safety to the extent such considerations are integrally related to operational safety hazards or measures taken to abate such hazards. The term "safety of railroad operations," then, relates to the conditions and procedures necessary to achieve the safe movement of equipment over the rails. For instance, the safety of railroad operations requires that track forces engaged in laying or repairing welded rail observe certain procedures impacting on the final condition of the track and assure that geometric and other standards are met (see 49 CFR Part 213). Similarly, proper precautions to assure that trackmen are not struck by trains or other equipment moving over the rails are part of the safety of railroad operations. On the other hand, most hazards related to the handling of welding apparatus are non-operational concerns.

. . .

FRA regulation of railroad safety under statutes which FRA administers consists of numerous elements designed to promote the safe transportation of persons and property over the nation's railroads. Implicit in each major area of regulation is the three-fold objective of protecting passengers, persons along the right-of-way, and railroad employees. Protection of the public generally and employees in particular is, of necessity, an integrated undertaking. As a general rule, it is not possible to regulate an individual hazard without impacting on other, related working conditions, nor without impacting on the safe transportation of persons and property. Therefore, it is essential that the safety of railroad operations be the responsibility of a single agency and that that agency undertake new initiatives in an informed and deliberate fashion, weighing the impact of particular proposals on longstanding industry practices and pre-existing regulations.

. . .

There are, of course, some inherent dangers in the movement of any means of carriage (e.g., airplane, truck, barge, train). Enlightened regulation involves both a concerted effort to reduce risks and a recognition that, unless all commerce is to cease, certain risks can be guarded against only by the alertness and discipline of individuals. Both OSHA and FRA seek to assure workplaces are as safe as possible. To that end the Ninety-First Congress enacted both the OSH Act and the Federal Railroad Safety Act of 1970. Within the area of railroad operations, it is FRA which must decide what regulations are necessary and feasible.

B. EXERCISE OF FRA JURISDICTION OVER RAILROAD OPERATIONS

The overall FRA program to assure the safety of railroad operations may be generally subdivided into three fields: (1) Track, roadbed, and associated devices and structures, (2) equipment, and (3) human factors. FRA has now exercised its statutory authority with respect to each of these regulatory fields by actual rulemaking. While it is expected that additional regulatory initiatives may be undertaken, as necessary, in each of the major regulatory fields, it is the judgment of the agency that piecemeal regulation of individual hazards in any of the three regulatory fields by any other agency of government would be disruptive and contrary to the public interest. Should it be demonstrated that further specific regulatory action is required prior to the completion of an FRA rulemaking addressing a given class of hazards within one of the three major fields, FRA will not hesitate to employ its emergency powers or to initiate special-purpose proceedings directed to the solution of individual problems.

Therefore, as the primary regulatory agency, FRA has exercised and continues to exercise its jurisdiction over the safety of railroad operations. The following discussion will describe the dimensions of the three regulatory fields presently occupied by FRA. In addition, the regulation of employee sleeping quarters and transportation of hazardous materials are discussed as separate problem areas. The discussion is designed to be illustrative rather than exhaustive.

TRACK, ROADBED AND ASSOCIATED STRUCTURES AND DEVICES

The FRA Track Safety Standards (49 CFR Part 213) prescribe geometric and other technicai standards for track structures and roadbed and require a program of inspections. While standards have not been issued related to the dimensions or structural integrity of bridges, tunnels or other similar structures, FRA is exercising its authority with respect to the operational safety of such structures through inspections in response to specific requests and may undertake rulemaking proceedings at a future date. FRA has affirmatively determined that issuance of Federal regulations governing walkways on bridges is not warranted based on the projected cost of installation and the collateral safety problems which would be created (42 FR 22184; May 2, 1977).

. . .

EQUIPMENT

FRA administers and enforces the Safety Appliance Acts (45 U.S.C. 1-16), which were first enacted in 1893. These statutes, which are among the earliest Federal enactments bearing on occupational safety, require certain appliances such as automatic couplers, secure grab irons, and power brakes on all cars and locomotives. FRA and its predecessor agency have implemented these statutes with regulations detailing how safety appliances shall be designed and affixed (49 CFR Part 231) and prescribing inspection and maintenance standards for power brakes (49 CFR Part 232).

. . .

HUMAN FACTORS

The control of human factors which impact on the safety of railroad operations is the most complex and difficult of the three regulatory fields which are being addressed under the Federal Railroad Safety Act of 1970. However, FRA, with the cooperation of interested parties, has made major strides in addressing the most serious areas of concern related to this facet of railroad operations. A board survey of railroad operating rules and practices (including employee training and testing) has been initiated through mandatory filing of specified information; and railroads have been required to conduct programs of instruction, operational tests, and inspections to enforce compliance with their own safety rules (49 CFR part 217). Initial uniform operating rules pertaining to the protection of employees working between or under rolling equipment, operations within yard limits, and rear flag protection have now been issued (49 CFR part 218). See 42 FR 2318; January 11, 1977, and 42 FR 5059; January 27, 1977. Procedures governing the use of radio communications and rules governing the issuance of train orders by radio have also been adopted (49 CFR part 220, issued at 42 FR 5065; January 27, 1977).

FRA also administers and enforces the Hours of Service Act (45 U.S.C. 61-64b), which limits the hours of service of certain major categories of employees who are engaged in or connected with railroad operations. (See discussion below on Employee Sleeping Quarters.)

Again, FRA will continue to study the need for further rulemaking in the field of human factors. In the meantime, FRA will continue to exercise its authority over railroad operations by

enforcing standards already published, by utilizing its emergency powers, by promoting adherence to carrier safety rules, and by instituting any special proceedings which may be deemed necessary. As the primary regulatory agency in the area of railroad operations, it will be the responsibility of FRA to evaluate what further Federal action may be required.

EMPLOYEE SLEEPING QUARTERS

. . .

DEPARTMENT OF TRANSPORTATION HAZARDOUS MATERIALS REGULATIONS

. . .

C. OSHA JURISDICTION

As noted above, FRA has determined that a territorial approach to the exercise of its statutory jurisdiction over railroad safety such as that proposed in the NPRM would deplete energies and resources better devoted to the safety of railroad operations. If FRA were to address all occupational safety and health issues which arise in the railroad yards, shops, and associated offices, the agency would be forced to develop a staff and field capability which, to an extent, would duplicate the capability already possessed by OSHA. In view of this situation, FRA recognizes that OSHA currently is not precluded from exercising jurisdiction with respect to conditions not rooted in railroad operations nor so closely related to railroad operations as to require regulation by FRA in the interest of controlling predominant operational hazards.

The following survey of OSHA standards is intended to aid the railroad industry in evaluating the breadth of FRA's exercised jurisdiction by contrasting the roles of FRA and OSHA. This discussion cannot be regarded as definitive, since considerable experience in adjusting the relationship of FRA and OSHA standards will likely be required before an optimum Federal regulatory program can be achieved. All statements concerning OSHA and FRA authority and the applicability of individual regulations should be regarded as statements of general principle.

Again, in reading this discussion it should be kept in mind that to the extent matters addressed by the OSHA regulations are connected with or relate to railroad operations and may interact with or create operational hazards, it may be necessary for FRA and OSHA to consult concerning the interpretation or modification of such standards. As the primary regulatory agency concerned with railroad safety, FRA will not hesitate to adopt its own standards to assure a safe environment for railroad operations and to promote regulatory consistency.

GENERAL INDUSTRY STANDARDS

The areas discussed below correspond to subparts in the Occupational Safety and Health Standards (29 CFR Part 1910). FRA is aware that OSHA has proposed revocation of certain of these standards (42 FR 62734; December 13, 1977). However, since it is not possible to project at this time what final action OSHA might take with respect to individual provisions, this discussion addresses the OSHA regulations currently in effect.

WALKING-WORKING SURFACES (SUBPART D)

OSHA regulations concerning working surfaces deal with such matters as ladders, stairways, platforms, scaffolds and floor openings. Generally, these regulations are applicable in railroad offices, shops, and other fixed work places. There are three principal exceptions to the rule. First, they would not apply with respect to the design of locomotives and other rolling equipment used on a railroad, since working conditions related to such surfaces are regulated by FRA as major aspects of railroad operations.

Second, as the agency which has exercised jurisdiction over railroad operations, FRA is responsible for the safe movement of rolling stock through railroad repair shops. OSHA requirements for general industry are in some respects inconsistent with the optimum safety of employees in this unique environment where hazards from moving equipment predominate. Therefore, OSHA regulations on guarding of open pits, ditches, etc., would not apply to inspection pits in locomotive or car repair facilities. FRA is better equipped to assess proper clearance technology and employee knowledge of existing industry practices as well as the prevalence and severity of hazards represented by specific injury occurrence codes in accident/incident reporting statistics. FRA is responsible for determining what additional regulatory steps, if any, any be necessary in this area in light of overall safety considerations.

Third, the OSHA regulations would not apply to ladders, platforms, and other surfaces on signal masts, cantenary systems, railroad bridges, turntables, and similar structures or to walkways beside the tracks in yards or along the right-of-way. These are

areas which are so much a part of the operating environment that they must be regulated by the agency with primary responsibility for railroad safety. Therefore, FRA will determine the need for an feasibility of general standards to address individual hazards related to such surfaces, keeping in mind the requirement of proper clearances and the familiarity of employees with existing industry designs. It should be noted that FRA and its predecessor agency have traditionally required the correction of defective ladders and walkways on signal structures under the authority of the Signal Inspection Act (49 U.S.C. 26(e)). Further, the FRA Track Safety Standards require the control of vegetation growth immediately adjacent to roadbed which might interfere with employees performing normal trackside duties (49 CFR §213.37). FRA will not hesitate to use its emergency powers to achieve the correction of other, similar problems.

MEANS OF EGRESS (SUBPART E)

By their own terms, OSHA regulations concerning egress do not apply to rolling equipment. However, the regulations do apply to the extent of the regulatory language to fixed railroad facilities other than employee sleeping quarters covered by the Hours of Service Act, as amended.

POWERED PLATFORMS, MANLIFTS, AND VEHICLE-MOUNTED WORK PLATFORMS (SUBPART F)

. . .

OCCUPATIONAL HEALTH AND ENVIRONMENTAL CONTROL (SUBPART G)

These rules impose certain standards related to ventilation, occupational noise exposure, and radiation. The rules apply

according to their own terms in the railroad industry, with the following exceptions.

First, the OSHA ventilation standards (29 CFR §1910.94) do not contain any provisions which address hazards growing out of railroad operations, as such. By their terms, they have no application to locomotive cab or caboose environments, to passenger equipment, or to operational situations in yards or along the right-of-way.

Second, FRA views the question of occupational noise exposure of employees engaged in railroad operations, during their involvement in such operations, as a matter comprehended by the regulatory fields over which FRA has exercised its statutory jurisdiction. FRA is therefore responsible for determining what exposure levels are permissible, what further regulatory steps may be necessary in this area, if any, and what remedial measures are feasible when evaluated in the light of overall safety considerations....

. . .

Any review of further remedial measures in the area of occupational noise exposure in locomotive cabs and cabooses must take into account the need to preserve the alertness of employees to rail transportation hazards affecting the employees, passengers and the general public along the right-of-way. Only the primary regulatory agency in the area of railroad safety is equipped to evaluate these considerations and to fashion appropriate solutions. The same considerations apply to employees' exposure to retarder noise and other noise emanating primarily from railroad operations.

. . .

HAZARDOUS MATERIALS (SUBPART H)

. . .

PERSONAL PROTECTIVE EQUIPMENT (SUBPART I)

OSHA regulations concerning personal protective equipment apply according to their terms, except to the extent the general requirements might be read to require protective equipment responsive to hazards growing out of railroad operations. For instance, OSHA could not prescribe attire designed for mandatory use of an employee while involved in uncoupling cars or operating a locomotive. Close OSHA-FRA cooperation will be required to ascertain whether requiring the use of certain protective equipment by persons working along the railroad right-of-way, without additional requirements assuring attention to rail transportation hazards, may tend to aggravate such hazards by obscuring vision or muffling the noise of approaching trains. If necessary, FRA will not hesitate to issue regulations placing conditions on the use of protective equipment in such circumstances or otherwise regulating its use.

GENERAL ENVIRONMENTAL CONTROLS (SUBPART J)

. . .

MEDICAL AND FIRST AID (SUBPART K); FIRE PROTECTION (SUBPART L)

. . .

COMPRESSED GAS AND COMPRESSED AIR EQUIPMENT (SUBPART M)

. . .

MATERIALS HANDLING AND STORAGE (SUBPART N)

. . .

MACHINERY AND MACHINE GUARDING (SUBPART O); HAND AND PORTABLE POWERED TOOLS AND OTHER HAND-USED EQUIPMENT (SUBPART P); WELDING, CUTTING AND BRAZING (SUBPART Q); ELECTRICAL (SUBPART S)

. . .

TOXIC AND HAZARDOUS SUBSTANCES (SUBPART Z)

The OSHA regulations apply according to their terms, except with respect to the shipment or transportation of hazardous materials, which is controlled by the Department of Transportation Hazardous Materials Regulations, and the regulation of air contaminants in locomotive cab and caboose environments.

It is the judgment of FRA that the exposure of operating employees to air contaminants in the locomotive cab or caboose environment is an issue integrally related to the ability of employees to perform their duties and to the regulation of the rail equipment itself. Thus, air contaminant exposure in those particular environments must be viewed as a concern within two of the regulatory fields over which FRA has exercised jurisdiction (rail equipment, human factors)....

. . .

CONSTRUCTION STANDARDS

Section 1910.12 of OSHA's General Industry standards provides that the standards contained in 29 CFR Part 1926 relating to construction work are adopted as regulations under Section 6 of the OSH Act and shall apply to every "employment" engaged in construction work. "Construction work" is broadly defined to include construction, alteration, and/or repair, including painting and decorating. To the extent that hazardous construction working conditions do not fall within FRA's exercise of authority relating to the safety of railroad operations, the OSHA standards apply according to their terms in the railroad industry.

D. CONCLUSION

The foregoing discussion of FRA's view of the proper role for it to play with respect to the railroad industry in the overall Federal occupational safety and health regulatory scheme is intended to assist all interested parties in their efforts to determine the extent to which FRA regulations and OSHA regulations will apply to working conditions within the railroad industry. As was stated earlier in this notice, the primary intent of FRA is to assure an effective and coherent railroad occupational safety and health program. We believe the policy set forth in this document will assure that each of the principal Federal agencies charged with the responsibility for carrying out this program, that is, FRA and OSHA, will concentrate its efforts in those areas in which it possesses the greatest experience and expertise. In those cases in which there may be some question as to which is the primary regulatory agency, cooperative efforts between the two agencies should avoid the creation of regulatory gaps on the one hand, or

unnecessary duplication on the other. At any time that a hazardous working condition impacts upon the overall safety of railroad operations, FRA will take the initiative in developing a proper regulatory response.

. . .

Issued in Washington, D.C., on March 10, 1978.

JOHN M. SULLIVAN,
Administrator.

APPENDIX I

DEPARTMENT OF TRANSPORTATION
Federal Railroad Administration
[49 CFR Chapter II]
[Docket No. RSB-1 Notice 1]

WALKWAYS ON RAILROAD BRIDGES, TRESTLES, AND SIMILAR STRUCTURES

Advance Notice of Proposed Rulemaking

The Federal Railroad Administration (FRA) is studying the need for a Federal regulation to require walkways on railroad bridges, trestles and similar structures. The purpose of this Notice is to solicit views and comments from the public as to the necessity, cost and benefit to be derived from Federal regulation in this area.

Background Information

On July 15, 1975, the Railway Labor Executives Association (RLEA) filed a rulemaking petition requesting that FRA issue a regulation "to require that all railroad bridges, trestles and similar structures used by trains and switching movements on all railroads in the United States have safe walkways placed along them" (FRA Rulemaking Petition 75-5).

. . .

Public Participation Requested

FRA believes that additional information is required concerning the necessity for, the cost of, and the benefits to be derived from, a Federal regulation requiring walkways on railroad bridges, trestles and similar structures. FRA solicits written comments from the public, particularly from individual States, the railroad industry and railroad employee organizations.

. . .

Issued in Washington, D.C. on November 9, 1976.

ASAPH H. HALE,
Administrator

APPENDIX J

DEPARTMENT OF TRANSPORTATION
Federal Railroad Administration
[49 CFR Chapter II]
[Docket No. RSB-1, Notice 2]

WALKWAYS ON RAILROAD BRIDGES, TRESTLES, AND SIMILAR STRUCTURES

Termination of Rulemaking Proceeding

AGENCY: Federal Railroad Administration, DOT

ACTION: Termination of rulemaking proceeding.

SUMMARY: On November 15, 1976, the Federal Railroad Administration (FRA) published an advance notice of proposed rulemaking (ANPRM, 41 FR 50302) in response to two petitions for rulemaking filed by the Railway Labor Executives Association (RLEA). The ANPRM stated that FRA was studying the need for a Federal regulation requiring the construction of walkways on railroad bridges, trestles, and similar structures. Interested persons were requested to comment as to the necessity for, cost of, and benefit to be derived from a Federal regulation concerning this subject. After additional study and analysis of the comments submitted in response to the ANPRM, the FRA has decided to terminate this rulemaking proceeding.

. . .

Issues Considered

1. What is the necessity for a Federal regulation requiring walkways on railroad bridges, trestles and similar structures?

Several commenters expressed the opinion that a rule requiring walkways on all railroad bridges, trestles and similar structure would not contribute to the safety of railroad employes. They contended that experience has shown that the presence or absence of walkways has little influence on the injury rate for employees.

. . .

Other commenters urged FRA to review accident statistics to determine whether the lack of walkways on railroad bridges, trestles or similar structures represents a substantial danger of employee injury when compared with other employee injury causes. FRA has reviewed accident data for the 13-year period from 1962 through 1974. A comparison of three cause codes relating to falls from or through bridges or trestles with a single cause code relating to "falling on stairways, ramps, station platforms, etc." revealed almost five times as many injuries resulting from the later category as resulted from all three categories related to bridges and trestles.

2. Would the cost of providing walkways on bridges, trestles and similar structures outweigh the benefits to be derived?

Many of the commenters emphasized the potentially high cost of compliance should a rule requiring walkways on all bridges, trestles and similar structures be issued. Data submitted by one

commenter indicated that there are approximately 2,100 miles of bridges, trestles and similar structures that do not presently have walkways. This commenter provided an estimated cost range for the construction of walkways that varied from a low of $45 per linear foot of walkway when installed concurrently with deck renewal or new construction, to a high of $100 per linear foot for installations on existing structures. The FRA agrees with this commenter that $65 per linear foot of walkway would be a reasonable average estimate for determining the overall potential cost to the industry. Given this estimate, a program requiring the construction of walkways along one side of the 2,100 miles of structures not presently so equipped would cost in excess of $700 million. Even if a more restricted approach were taken, requiring the construction of walkways at the time of deck renewal or new construction only, the potential cost would be approximately $500 million.

Nine commenters, including two State agencies, expressed the concern that a requirement to provide walkways on all such structures would have a negative impact on overall railroad safety because it would lead to a diversion of railroad resources from other maintenance or improvement programs that would have a more direct and significant impact on safety. Several commenters suggested that the shear magnitude of the cost of such a program would lead to the need for Federal financial assistance to prevent the cost of compliance from resulting in line abandonments and railroad insolvencies.

. . .

Conclusions and Action

In compliance with the President's policy of economic impact evaluation of Federal agency actions...the FRA has determined that the issuance of a Federal rule requiring walkways on railroad bridges, trestles, and similar structures cannot be justified at the present time. First, any such rule would impose significant added burdens in terms of the large dollar cost to the railroad industry for construction of the walkways. ...Secondly, neither the commenters nor the FRA has been able to demonstrate that such a rule would result in a definite or measurable improvement to railroad employee safety....

. . .

Issued in Washington, D.C. on April 26, 1977.

BRUCE M. FLOHR
Deputy Administrator

APPENDIX K

DEPARTMENT OF TRANSPORTATION
Federal Railroad Administration
49 CFR Part 218
[FRA Docket No. ROS-2, Notice No. 1]
RIN 2130 — AA48

Bridge Worker Safety Rules

AGENCY: Federal Railroad Administration (FRA), DOT.

ACTION: Notice of proposed rulemaking.

SUMMARY: FRA proposes to establish safety standards for the protection of workers on railroad bridges.

. . .

SUPPLEMENTARY INFORMATION:

Legislative Background

Section 19 of the Rail Safety Improvement Act of 1988 ("RSIA"), Pub. L. 100-342, 102 Stat. 624 (June 22, 1988), amended section 202 of the Federal Railroad Safety Act of 1970 ("FRSA"), 45 U.S.C. 431, by adding a new subsection (n), which provides that FRA should " *** issue such rules, regulations, orders, and standards as may be necessary for the safety of maintenance-of-way employees, including standards for bridge safety equipment, such as nets, walkways, handrails, and safety lines, and requirements relating to instances when boats shall be used."

FRA intends in this proceeding to make comprehensive determinations regarding the regulatory action needed to address the safety of workers on railroad bridges. In considering the necessity of such rules, pursuant to section 19 of the RSIA, one issue to be addressed is the adequacy and appropriateness of currently applicable federal standards issued by the Occupational Safety and Health Administration (OSHA).

Jurisdictional Background

FRA has a complementary relationship with OSHA that includes overlapping jurisdiction with respect to occupational safety and health issues in the railroad industry. Just as FRA lacks safety jurisdiction in non-railroad environments, OSHA lacks jurisdiction over safety issues relating directly to railroad operations—a subject over which FRA's authority is exclusive. Thus, one question is whether the occupational safety issues presented by work on railroad bridges are so inherent to the railroad environment that FRA alone should regulate them, or whether they cut across industry lines without raising special concerns in the railroad context and thus are properly addressed by general OSHA standards.

OSHA has not promulgated regulations specifically applicable to work on railroad bridges or to work on other types of bridges. However, a variety of OSHA rules addressing occupational safety issues commonly found in railroad bridge work are found in part 1926, Safety and Health Regulations for Construction, and part 1910, Occupational Safety and Health Standards (usually referred to as general industry standards). Where other agencies possess overlapping jurisdiction, section 4(b)(1) of the Occupational

Safety and Health Act, 29 U.S.C. 653(b)(1) contemplates that federal safety agencies can displace OSHA:

> Nothing in the Act shall apply to working conditions of employees with respect to which other Federal agencies *** exercise statutory authority to prescribe or enforce standards or regulations affecting occupational safety or health.

In 1978, FRA issued a Statement of Policy setting out the respective areas of jurisdiction of FRA and OSHA in the railroad industry. 43 FR 10583 (March 14, 1978). In that Statement, FRA drew the jurisdictional line between "occupational safety and health" issues in the railroad industry and work related directly to "railroad operations," with FRA having jurisdiction over the latter, and OSHA over the former, except where compliance with OSHA regulations could be shown to adversely affect the safety of rail operations. FRA noted that it

> has determined that a territorial approach to the exercise of its statutory jurisdiction over railroad safety *** would deplete energies and resources better devoted to the safety of railroad operations. If FRA were to address all occupational safety and health issues which arise in the railroad yards, shops, and associated offices, the agency would be forced to develop a staff and field capability which, to an extent, would duplicate the capability already possessed by OSHA.

43 FR 10585. Both courts and the Occupational Safety and Health Review Commission have held that the assertion of authority in a policy statement constitutes an exercise of FRA's statutory authority under the rail safety laws sufficient to displace OSHA standards, pursuant to section 4(b)(1) of the OSH Act, with respect to health and safety issues intrinsic to "railroad operations." *Velasquez v. Southern Pacific Transp. Co.*,

734 F.2d 216, 218 (5th Cir. 1984); *Southern Pacific Transp. Co. v. Usery*, 539 F.2d 386 (5th Cir. 1976), *cert. denied*, 434 U.S. 874 (1977); *Consolidated Rail Corp.*, 10 OSHC (BNA) 1577 (1982).

The Policy Statement points to FRA's "proper role" as concentrating "its limited resources in addressing hazardous working conditions in those traditional areas of railroad operations (*i.e.*, "the movement of equipment over the rails") in which (FRA) has special competence." 43 FR 10585. After considering the necessity of standards for work on bridges pursuant to section 19 of the RSIA, FRA now believes that such work may be so much a part of railroad operations that FRA should address this issue in its own regulatory program.

FRA has previously addressed working conditions on bridges. After issuing an ANPRM in 1976, holding hearings, and receiving comments on the need for walkways on railroad bridges, FRA concluded that a federal regulation requiring the construction of bridge walkways was not warranted, and FRA terminated the rulemaking proceeding in 1977. 42 FR 22184 (May 2, 1977). Then in the 1978 Policy Statement FRA recognized that OSHA has relevant rules and addressed working conditions on railroad bridges directly:

> The OSHA regulations would not apply to *ladders, platforms, and other surfaces on* signal masts, catenary systems, *railroad bridges*, turntables, and similar structures, or to walkways beside the tracks in yards or along the right-of-way. These are areas which are so much a part of the operating environment that they must be regulated by the agency with the primary responsibility for railroad safety. Therefore, FRA will determine the need for and feasibility

> of general standards to address individual hazards related to *such surfaces*, keeping in mind the requirement of proper clearances and the familiarity of employees with existing industry designs.

43 FR 10587 (emphasis added). As this segment of the Policy Statement indicates, FRA intended to displace OSHA regulations with respect to the surfaces on bridges, *i.e.*, track structures, but did not intend to prevent OSHA from exercising its more general responsibilities for the safety of railroad workers with respect to fall protection and respiratory equipment. However, these distinctions have proved confusing to the regulated community, railroad employees, inspectors, and in some instances, adjudicatory bodies. FRA has recently received a number of legal memoranda addressing these issues from railroads and railroad associations; all of these evidence this confusion. All are available for inspection in the docket of this rulemaking.

Also, labor organizations have complained about confusion regarding the appropriate federal agency to approach when railroad bridge worker safety issues arise. To ameliorate that situation, the Brotherhood of Maintenance of Way Employees (BMWE), on one hand, has urged aggressive OSHA enforcement of its standards on railroad bridges, and on the other hand, was the moving party seeking inclusion of this issue in the RSIA. Accordingly, FRA understands the BMWE's objective to be clarity as between FRA and OSHA, not some specific result. FRA agrees that work on railroad bridges exposes workers to significant risk of harm. To be effective in reducing those risks, the appropriate federal standards for personal protection, and the identity of the agency responsible for their enforcement, must be crystal clear.

Bridge Work Hazards

Most railroad bridges crossing water, streets, and valleys were built many decades ago. In that time, railroad traffic has changed, with many bridges now having to support passage of heavier cars and denser traffic. Due to the considerable age of railroad bridges and these changing traffic patterns, more frequent maintenance will be necessary, increasing the exposure of workers to bridge maintenance hazards. Those risks are real. ...

. . .

Participation Requested

Having previously reserved at least some aspects of work on bridges to itself through "negative displacement" under section 4(b)(1), FRA now proposes to extend its authority to all aspects of railroad bridge worker safety. ...

. . .

In the railroad safety context, FRA believes that it can address the health and safety hazards confronting railroad bridge workers by issuing and enforcing its own regulations. By affirmatively asserting regulatory authority over all aspects of railroad bridges, both operational and otherwise, FRA can tailor relevant OSHA regulations to take account of the peculiarities of the railroad environment.

Under this proposal, the inspection of bridge worker safety equipment would be completed by the more appropriate inspection force. FRA inspectors possess extensive knowledge of the practices relating to track, signal, and train control operation—knowledge that is essential to safely complete an inspection of the fall protection and personal protective equipment being employed at a given bridge repair site. FRA inspectors

often are aware of construction and repair operations in progress, and can therefore inspect for adequate protective equipment in a timely fashion. In addition, this proposal will prevent duplicative inspection efforts as FRA inspectors, unlike OSHA inspectors, can conduct an inspection of bridge worker safety devices as they complete their periodic track and signal inspections. Finally, FRA's proposal will provide clarity for workers, industry representatives, inspectors, and adjudicatory bodies when issues concerning personal protective equipment and fall protection arises in the field.

FRA's proposed rule mirrors OSHA regulations concerning personal protective equipment and fall protection. However, changes have been made as necessary accommodate the railroad environment, and those changes are printed in italics for convenience.

. . .

List of Subjects in 49 CFR Part 218

Railroad bridge work safety, Railroad safety.

The Proposed Rule

Note: Italicized portions indicate changes from OSHA regulations.

In consideration of the foregoing, FRA proposes to amend part 218, title 49, Code of Federal Regulations as follows:

PART 218—[AMENDED]

1. The authority citation for part 218 continues to read as follows:

Authority: 45 U.S.C. 431, 438, as amended; Pub. L. 100-342; and 49 CFR 1.49(m).

2. By amending the table of contents to add subpart F as follows:

Subpart F—Performing Work on Bridges

Sec.

218.71 Purpose and scope.
218.72 Walkways and railings.
218.73 Safety belts, lifeline, and lanyards.
218.74 Safety nets.
218.75 Working over or near water.
218.76 Respirator protection.
218.77 Head protection.
218.78 Scaffolding.
218.79 Personal protective equipment.
218.80 Foot protection.
218.81 Eye and face protection.

. . .

Issued in Washington, DC, on January 24, 1991.

Gilbert E. Carmichael,
Federal Railroad Administrator

APPENDIX L

There was in force at the time of this occurrence a regulation promulgated by the Occupational Safety and Health Administration which in part states:

> Safety nets shall be provided when work places are more than 25 feet above the ground or water surface, or other surfaces where the use of ladders, scaffolds, catch platforms, temporary floors, safety lines, or safety belts is impractical.

If you decide that the Chicago and North Western Transportation Company failed to comply with this regulation you may consider that fact together with all the other facts and circumstances in evidence in determining whether or not the Chicago and North Western Transportation Company was negligent.

(C. 570)

APPENDIX M

DEPARTMENT OF TRANSPORTATION'S INTERPRETATION OF SECTION 4(b)(1) OF OSHA

SUBJECT: Interpretation of section 4(b)(1) of the Occupational Safety and Health Act of 1970

FROM: General Counsel

TO: The Deputy Secretary

The major factor preventing completion of jurisdictional agreements with the Department of Labor, Occupational Safety and Health Administration (OSHA), has been, and continues to be, differing interpretations by OSHA and this Department of section 4(b)(1) of the Occupational Safety and Health Act of 1970 (the Act). The position of OSHA is set forth in an undated, unsigned memorandum handed to you by Labor Department Solicitor Kilberg on September 6, 1974.

I.

Section 4(b)(1) of the Act provides:

"Nothing in this Act shall apply to working conditions of employees with respect to which other Federal agencies, and State agencies acting under section 274 of the Atomic Energy Act of 1954, as amended (42 U.S.C. 2021), exercise statutory authority to prescribe or enforce standards or regulations affecting occupational safety or health."

II.

Threshold Jurisdiction: "Statutory Gap Theory"

The crux of the DOT-OSHA disagreement relates to the manner in which this seemingly simple section is read. OSHA concentrates exclusively on the last full phrase in the section, "exercise statutory authority to prescribe or enforce standards or regulations affecting occupational safety or health." The OSHA interpretation depends upon reading "to prescribe or enforce standards or regulations affecting occupational safety or health" as modifying "statutory authority". Thus, OSHA reaches its position that the section 4(b)(1) exemption can apply only when another agency has specific, express statutory authority relating to occupational safety and health. OSHA does not accept the term "affecting" in its common meaning (to produce an effect upon, influence, or make an impression upon). The Solicitor asserts that agency standards must eliminate or reduce any condition perceived by OSHA as a hazard to workers for OSHA jurisdiction to be preempted.

The DOT Office of the General Counsel does not agree with OSHA's interpretation of this threshold issue. Rather, we construe section 4(b)(1) to mean:

"Nothing in [the] Act shall apply to working conditions... with respect to which other Federal agencies...prescribe or enforce standards or regulations affecting occupational safety or health."

The phrase "exercise statutory authority" means only that a Federal agency must have authority to prescribe directly, rather than indirectly through contract compliance or similar provisions. The phrase "working conditions" is placed in a frame of reference

by "of employees", and "with respect to which" clearly relates (and in this respect OSHA agrees) to "working conditions". The standards or regulations prescribed by another Federal agency (rather than the underlying statutory authority to prescribe such standards or regulations) must affect occupational safety or health.

Simple logic demands rejection of the OSHA interpretation. If, as OSHA has indicated, the Mining Enforcement and Safety Administration (MESA), Department of the Interior, is the only Federal agency, other than OSHA, which administers statutes designated primarily and exclusively to assure workers safe and healthful conditions of employment, and if OSHA is correct that only through such specific authority can the section 4(b)(1) exemption be triggered, the Congress would never have written that section of the Act in the manner in which it appears.

Section 4(b)(1), as interpreted by OSHA, would simply state:

"Nothing in this Act shall apply to working conditions of employees with respect to which MESA and State agencies acting under section 274 of the Atomic Energy Act of 1954...prescribe or enforce..."

The Congress obviously did not intend such a result. In discussing the exercise of authority by other agencies, Mr. Steiger stated:

"Both the substitute and H.R. 16785 provide that the act shall not apply where another Federal agency is exercising authority to prescribe or enforce occupational safety and health standards... While this section does not foreclose the authority of the Secretary of Labor in instances where another agency or department has statutory authority in the area of occupational

safety and health, but has taken no action, it is anticipated that these instances will be exceedingly rare. It is intended that the Secretary of Labor will not exercise his authority where another agency with appropriate jurisdiction has taken steps to exercise its authority, even though the action might be at the formative stage of regulations or enforcement." (Legislative History of the Occupational Safety and Health Act of 1970, ("Legislative History"), Subcommittee on Labor of The Committee on Labor and Public Welfare, 92nd Cong., 1st Sess., p. 997.)

It is difficult to imagine that the Congress was unaware that Federal agencies administer statutes which do not speak specifically to the occupational safety or health of workers, yet authorize the promulgation of regulations and standards affecting these conditions.

III.

Agency Implementation: "Regulatory Gap Theory"

It is essential to understand the meaning of "working condition" in section 4(b)(1). OSHA asserts that the phrase relates to a particular hazardous working condition. This interpretation classifies every minute detail of a working environment as a separate, identifiable condition constituting a specific hazard to workers. Thus, if an agency regulating a field of activity has not promulgated a specific standard relating to an identifiable detail of the working environment, the section 4(b)(1) exemption would not apply with respect to that particular condition. Apparently, in the view of OSHA, the failure of an agency to promulgate a standard because none is needed, or the failure of an agency to promulgate a standard which states a particular condition need not be met, would constitute a failure of

the agency to exercise its jurisdiction. Rejection by OSHA of "negative regulation" ignores reality.

We believe "working condition" can only be interpreted in light of the dual purposes of the Act. The term is not defined in the Act and the legislative history is far from precise on this point. At times the discussion with respect to the application of the exemption used the term "particular working conditions" (Legislative History. p. 162), and at other times it used the term "working condition" (Legislative History, p. 864). What was meant by "particular", however, was never discussed. Parts of the discussions relating to the exemptions also used the term "industry" (Legislative History, p. 1919-20).

The Act was intended both (1) to provide comprehensive coverage to the working men and women of this country, and (2) to avoid duplication of effort and confusion because of overlapping Federal jurisdictions. It is these two objectives that form a basis for defining "working condition". The "working condition" exemption must be interpreted to refer to the specific areas which are regulated by an agency in the interest of safety or health and which directly affect the statutory responsibilities of the agency.

IV.

Effect of Agency Action: "Employee Gap Theory"

Recently, OSHA has propounded, the Occupational Safety Review Commission has accepted, yet another manner in which the section 4(b)(1) exemption can be rendered meaningless, even when an agency has and exercises authority to alleviate a hazardous working condition. OSHA, in arguing the exemption

cannot be applied to an entire industry (and no agency disputes this reasoning) examines the statutory words "with respect to which" and concludes the phrase relates to "working conditions" rather than to "employees". Nevertheless, OSHA now insists that an agency's regulation of a working condition does not trigger the exemption unless the authority of the agency runs directly to a worker subject to the agency's jurisdiction. Thus, a condition recognized as hazardous by a cognizant agency, and subject to agency standards to prevent injury, is subject to OSHA's jurisdiction whenever an employee other than one subject to the agency's authority is present.

The "employee gap" theory is inconsistent with OSHA's valid reading of "working condition...with respect to which" and with common sense. If an agency is charged with responsibility for public safety, or even the safety of a class of the public, its specific discharge of that responsibility is valid with respect to all who may be exposed to the condition.

V.

Record Keeping

Section 24(a) of the Act requires the Secretary of Labor to compile certain accident figures. This section, however, specifically provides that it "shall not cover employments excluded by Section 4 of the Act." OSHA maintains that the provision in section 24 referring to section 4 refers exclusively to section 4(a). Section 4(a) essentially provides that the Act supplies to "employment" performed in all the States and other areas under the jurisdiction of the United States.

We disagree with that interpretation of the relationship of section 24 to section 4. The exclusion in section 24 applies to all of section 4. If it were meant to apply only to section 4(a), it would have been relatively simple to indicate this limitation, but this was not done. Also section 4(a) is generally a statement of *applicability*, and it is section 4(b)(1) that basically contains the *exemptions*. OSHA's reasoning would require reading "Nothing in this Act" as meaning "Nothing in this Act except section 24."

VI.

Summary

We have been engaged in negotiations to conclude memoranda of understanding to delineate jurisdictional responsibilities of OSHA and DOT administrations. Each time agreement appears possible, OSHA has developed a new "theory" to prevent recognition of DOT authority. As noted in this memorandum, we cannot accept the various theories propounded by OSHA, nor can we enter agreements subject to those theories.

Rodney E. Eyster

APPENDIX N

March 7, 1989

Ms. Cynthia L. Attwood
Associate Solicitor
Solicitor of Labor
U.S. Department of Labor
200 Constitution Avenue, N.W.
Washington, D.C. 20210

Dear Ms. Attwood:

I write in response to your request for answers to two questions: (1) does the Federal Railroad Administration (FRA) have regulations to ensure that fall protection equipment is provided railroad workers where appropriate; and (2) does FRA have jurisdiction over the safety of workers performing track repair and maintenance?

With regard to fall protection for railroad workers, FRA does not now have such a rule in place. However, we expect to publish in the near future a Notice of Proposed Rulemaking concerning the safety of railroad employees working on bridges. *See* Rail Safety Improvement Act of 1988 (Pub. L. 100-342, 102 Stat. 624, June 22, 1988). We expect the proposed rule to address personal protective apparatus for use by railroad employees working on walkways, over or near water, or on scaffolds. These devices would include safety belts, lifelines, lanyards, safety nets, boats, railings and respirators.

As to protection of maintenance-of-way workers performing track maintenance or repair, responsibility for their safety is

FRA's, according to the Policy Statement issued by FRA March 14, 1978, which delineates respective areas of FRA and OSHA jurisdictional authority. 43 F.R. 10583. Following prefatory statements that FRA activity in the area of occupational safety will concentrate on the "safety of railroad operations" (*i.e.*, "conditions and procedures necessary to achieve the safe movement of equipment over the rails"), the Policy Statement notes that ". . . proper precautions to assure that trackmen are not struck by trains or other equipment moving over the rails are part of the safety of railroad operations." 43 F.R. 10585.

In addition, the Policy Statement provides that "...OSHA regulations would not apply to...walkways beside the tracks in yards or along the right-of-way. These are areas which are so much a part of the operating environment that they must be regulated by the agency with primary responsibility for railroad safety." 43 F.R. 10587.

I hope this information is helpful. If you have any further questions, please contact me.

Very truly yours,

[Original Signed By]

Gregory B. McBride
Assistant Chief Counsel
for Safety

cc: Associate Administrator for Safety
Regional Director, Region 2

MOTION FILED
MAR 1 1993

92-1428

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

CHICAGO AND NORTH WESTERN TRANSPORTATION COMPANY,

Petitioner,

v.

TRACY TEMPLETON,

Respondent.

Petition for Writ of Certiorari to the Supreme Court of Illinois

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF THE ASSOCIATION OF AMERICAN RAILROADS IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

Pursuant to Rule 37.4 of the Rules of this Court, the Association of American Railroads ("AAR") respectfully moves for leave to file the attached Brief Of Amicus Curiae in support of Petitioner. Petitioner Chicago and North Western Transportation Company has consented to the filing of this brief. Respondent Tracy Templeton has refused consent to filing of this brief.

As is more fully set forth in the section of the brief entitled Statement Of Interest Of Amicus Curiae, the AAR is a voluntary, not-for-profit corporation headquartered in Washington, D.C. Its members constitute the majority of the nation's major railroads. The AAR's members operate approximately 76 percent of the line-haul mileage, produce

approximately 91 percent of the freight revenue, and employ approximately 90 percent of the railway work force in the United States, with nearly 225,000 employees.

The AAR is actively involved in the establishment of standards and recommended practices relating to railroad safety. Consequently, railroad operations and safety are among the purposes and concerns of the AAR. The interpretation and application of uniform federal laws and regulations also are matters of great importance to the AAR and its member railroads. The members of the AAR have a direct interest in maintaining uniform railroad safety regulations and in ensuring that railroads are not subject to arbitrary state court decisions in direct contravention of federal law.

The divided decision of the Illinois Supreme Court, in an action brought pursuant to the Federal Employers' Liability Act ("FELA") 45 U.S.C. §51, *et seq.*, violates traditional notions of federal supremacy and endangers the existence of a uniform set of federal laws and regulations governing the national railway system. The state high court, reversing a decision of the state intermediate court of appeals, determined, contrary to the overwhelming weight of federal authority, that the Federal Railroad Administration ("FRA") did not exercise exclusive jurisdiction over the safety of railroad employees working on bridges and allowed the Petitioner to be adjudged negligent in a FELA case for allegedly violating certain OSHA regulations. As further developed herein and in the Petition For Writ Of Certiorari, the state high court's decision is in direct conflict with indisputable pronouncements of all three branches of the federal government.

The state high court's unprecedented rejection of well-established federal authority and its unilateral diminution

of the FRA's established jurisdiction over the safety of railroad operations is a matter of great concern to railroads across the nation. The AAR submits that the decision of the Illinois Supreme Court, if allowed to stand and be followed, will lead to the continuing degeneration of uniform railroad safety regulations and to the development of a patchwork of regulations on a state-by-state basis. Such piecemeal and haphazard railroad regulation will cause confusion in the industry and will disrupt the efficient operation of the national railroad system. In light of the importance of these issues to the nation's railroads, it is appropriate that this Court consider the views of the AAR as set forth in this brief amicus curiae.

Wherefore, the Association of American Railroads prays that this Court grant this Motion for Leave to file its Brief Amicus Curiae.

Respectfully submitted,

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Respondent.

Petition for Writ of Certiorari to the Supreme Court of Illinois

BRIEF AMICUS CURIAE OF THE ASSOCIATION OF AMERICAN RAILROADS IN SUPPORT OF PETITIONER

STATEMENT OF INTEREST OF THE AMICUS CURIAE

The Association of American Railroads ("AAR") is a voluntary, not-for-profit corporation headquartered in Washington, D.C. Its members constitute the majority of the nation's major railroads who operate approximately 76 percent of the line-haul mileage, produce approximately 91 percent of the freight revenues, and employ approximately 90 percent of the railway work force in the United States. Nearly 225,000 employees rely upon the railroads to provide safe working conditions. The AAR is actively

involved in the establishment of standards and recommended practices related to railroad safety. Consequently, among the interests of the AAR are the maintenance of a national and nationally uniform system of railroad safety regulation under the direction of the most appropriate federal agency, with extensive experience and expertise in the field of railroad operations and safety.

The important questions of federal law raised in the Petition address the significance of a state high court's erroneous application of federal regulations in contravention of overwhelming federal authority. Such questions are of vital concern to the AAR. The member railroads of the AAR continuously operate on an interstate basis under the purview of federal regulations. Historically, by mandate of Congress, these regulations were developed uniformly and were applied by the courts, both state and federal, on a consistent basis in accordance with federal law. The member railroads depended and relied upon that body of federal law in governing their conduct. Now, the Supreme Court of the State of Illinois, without precedent, has rejected well-established federal authority and clear Congressional mandates. The court has unilaterally diminished the Federal Railroad Administration's ("FRA") jurisdiction over railroad safety and retroactively penalized the Chicago and North Western Transportation Company for following those mandates.

The state high court has directly contravened existing federal legislation presenting an important question of federal law. The state high court also retroactively imposed upon the Petitioner, in a case arising out of an accident that occurred in 1984, the court's interpretation of a nonbinding FRA statement published in 1991, in spite of contrary federal authority establishing the state of the law in 1984. If other state courts attempt to regulate railroad

safety and operations in such a manner, then the ensuing state-by-state regulation of railroad operating safety will cause confusion in the industry and will disrupt the efficient operation of the nation's railroads. As each state attempts to fashion its own regulatory agenda, the uniformity of railroad regulations will be challenged at various levels. Inevitable confusion will arise as railroads attempt to conform to myriad state "interpretations" of what was once considered to be uniform federal law. Such confusion will not only hamper the railroads in their efforts to conform their conduct to law but will prove a real threat to employee safety.

The importance of uniform federal standards for the national railway system has been virtually unquestioned until the Illinois Supreme Court chose to ignore established federal precedent in violation of longstanding principles of federal supremacy. In light of the importance of these issues to the nation's railroads, it is appropriate that this Court consider the views of the Association of American Railroads as set forth in this brief *Amicus Curiae*.

SUMMARY OF ARGUMENT

The Illinois Supreme Court decision presents a challenge to the supremacy of federal law and to basic notions of justice. The propriety and importance of uniform regulation of the nation's railroad system is beyond dispute. The Congressional prescription for a uniform regulatory system administered through the Department of Transportation's Federal Railroad Administration has been affirmed by the federal judiciary, applied by the FRA and deferred to by OSHA.

The case at bar establishes a precedent of improper state judicial activism and judicial fragmentation of the regulation of railroad safety in a state where almost all the nation's major railroads conduct business. The decision of the Supreme Court of Illinois, which improperly diminishes the FRA's jurisdiction, is in direct and obvious conflict with overwhelming federal authority and defeats the Congressional intent to apply uniform regulations to matters involving railroad operations. If the Illinois Supreme Court's decision is allowed to stand, other state courts likely will fashion their own exceptions to the national norm. Such patchwork, *ad hoc* regulation, as exemplified by Illinois, will severely prejudice the nation's railroads.

ARGUMENT

THE STATE HIGH COURT'S REJECTION OF CLEAR AND LONG-STANDING FEDERAL AUTHORITY CREATES A DANGEROUS PRECEDENT AND PRESENTS IMPORTANT QUESTIONS OF FEDERAL LAW.

A. All Three Branches Of The Federal Government Have Recognized The Importance Of Uniform Regulation Of Railroad Bridge Safety.

As demonstrated below, all three branches of the federal government support FRA jurisdiction over railroad bridge safety. The Illinois court's erroneous rejection of federal precedent led it to impose OSHA jurisdiction rather than FRA jurisdiction over railroad bridges. If allowed to stand, the precedent established by this decision will impact significantly upon all aspects of railroad operations and safety.

Each branch of the federal government repeatedly has recognized that one federal agency overseeing the safety aspects of railroad operations, including railroad bridge work, is inestimably preferable to a myriad of state or federal regulatory agencies with varying rules or varying interpretations of the same rule. Congress explicitly has conferred authority for the regulation of railroad safety upon the FRA. *See* 45 U.S.C. § 421 *et seq.* (1970). The federal judiciary likewise has recognized the FRA's preeminence in railroad safety matters and the inapplicability of OSHA regulations to railroad bridge work in particular. *See Velasquez v. Southern Pacific Transp. Co.*, 734 F.2d 216 (5th Cir. 1984); *Norfolk & W. Ry. v. Public Utilities Comm. of Ohio*, 727 F. Supp. 367, *aff'd.*, 926 F.2d 567 (6th Cir. 1991); *Southern Pacific Transp. Co. v. Usery*, 539 F.2d 386, 391 (5th Cir. 1976), *cert. denied*, 434 U.S. 874 (1977); *Southern Ry. v. Occupational Saf. & H. Rev. Comm.*, 539 F.2d 335, 339 (4th Cir. 1976). Furthermore, the two executive agencies involved in this matter, the FRA and OSHA, likewise have recognized the FRA's exclusive jurisdiction over railroad safety matters in general and over railroad operational bridge safety in particular.

The United States Congress has long recognized the national character of the railroad industry. In enacting the Federal Railroad Safety Act ("FRSA"), 45 U.S.C. § 421 *et seq.*, Congress reaffirmed in 1970 the importance of a comprehensive and uniform network of regulations governing all areas of railroad safety and operations. The FRSA's legislative history reflects the legislature's recognition of the railroad industry's "truly interstate character" which requires "a uniform body of regulations and enforcement." H.R. Rep. No. 91-1194, U.S. Cong. and Ad. News 4104, 4110 (1970). Pursuant to the FRSA, Congress required the Secretary of Transportation--not the Secretary of Labor—

to "prescribe . . . appropriate rules, regulations, orders, and standards for *all* areas of railroad safety." 45 U.S.C. § 431(a) (emphasis added).

Congress amended the FRSA by enacting the Rail Safety Improvement Act of 1988, 45 U.S.C. § 431(e) *et seq.* (1988). The 1988 amendment reconfirms FRA's exclusive jurisdiction over working conditions on or about railroad bridges, including safety equipment pertaining to fall hazards. The amended statute underscores Congressional conviction that the FRA is the most appropriate and uniquely qualified agency to assess the propriety of federal regulations designed to protect and promote the safety of employees working on or about railroad bridges. The 1988 Act specifically and unambiguously vests the Secretary of Transportation, and thus the FRA, with sole discretion and responsibility in issuing "such rules, regulations, orders and standards as may be necessary for the safety of maintenance-of-way employees, including standards for bridge safety equipment, such as nets, walkways, handrails, and safety lines . . . ." 45 U.S.C. § 431(n). The Congressional mandate thus is clear: the Secretary of Transportation, through the FRA, exercises preeminent jurisdiction over railroad bridge safety.

The federal judiciary has interpreted the FRSA and its amendment and has concluded that the FRA's jurisdiction over railroad bridge safety is exclusive and preemptive of other state or federal regulations. *Velasquez v. Southern Pacific Transp. Co.*, 734 F.2d 216 (5th Cir. 1984); *Norfolk & W. Ry. v. Public Utilities Comm. of Ohio*, 727 F. Supp. 367 (S.D. Ohio 1990); *aff'd.*, 926 F.2d 567 (6th Cir. 1991). The District Court in the *Norfolk* case concluded that the FRSA and its 1988 amendment preempted state regulation of railroad bridge safety and that the amendment "expressly confirm[ed] the Secretary's juris-

diction" in the area of bridge safety equipment. *Norfolk*, 727 F. Supp. at 371 (referring to the Secretary of Transportation). In *Velasquez*, a case described as "materially indistinguishable from the instant case" by the dissenting justices of the state high court, the federal appeals court specifically addressed the inapplicability of OSHA regulations to working conditions on railroad bridges. The court in *Velasquez* considered a Policy Statement issued by the FRA in 1978 declaring the FRA's exclusive jurisdiction over railroad bridges. The *Velasquez* court further affirmed that "OSHA regulations would not apply to . . . railroad bridges . . . ." *Velasquez*, 734 F.2d at 218, *quoting* 43 Fed. Reg. 10583, 10587. The United States Court of Appeals for the Fifth Circuit properly applied that FRA declaration in light of existing federal law and held that railroad bridges were not subject to OSHA regulation. *Velasquez*, 734 F.2d at 218. This federal decisional law upholds and preserves the uniformity of railroad safety regulations in accordance with continuing Congressional mandates.

The 1978 FRA Policy Statement considered by the court in *Velasquez* provides but one example of the FRA's assertion of exclusive jurisdiction over safety matters rooted in railroad operations. That Policy Statement dictated "that the safety of railroad operations [as defined in the Policy Statement] be the responsibility of a single agency . . . ." 43 Fed. Reg. 10583, 10585. Such an assertion of exclusive jurisdiction over railroad operations by the FRA was, and continues to be, consistent with federal law.

Less than one year after Congress amended the FRSA, the FRA reaffirmed its sole responsibility for the protection of railroad bridge workers in a letter to the Secretary of Labor. In that letter, dated March 7, 1989, the Assis-

tant Chief Counsel for Safety of the FRA cited the 1988 amendment to the FRSA in advising the Department of Labor that the FRA considered fall protection for railroad workers to be a matter within its regulatory purview and that it "expect[ed] to publish in the near future a Notice of Proposed Rulemaking concerning the safety of railroad employees working on bridges." In this letter, the FRA also addressed "respective areas of FRA and OSHA jurisdictional authority" and advised the Department of Labor that protection of maintenance-of-way workers is the "responsibility" of the FRA "according to the Policy Statement issued by FRA March 14, 1978." Therefore, as recently as 1989, the FRA reaffirmed its exclusive jurisdiction over railroad bridge safety and adhered to the views expressed in its 1978 Policy Statement.

Furthermore, OSHA itself has recognized that the safety aspects of areas devoted to railroad operations (as defined in the 1978 Policy Statement) are within the specific expertise of the FRA. The OSHA Review Commission, which is responsible for final administrative adjudication of the Occupational Safety & Health Act ("OSH Act"), has deferred to the FRA "as the dominant agency in its limited area" of railroad operations. *Secretary of Labor v. Consolidated Rail Corp.*, 10 OSHC 1577, 1580 (1982). In the *Consolidated Rail* matter, the OSHA Review Commission assessed the impact of the 1978 FRA Policy Statement and concluded that the Statement, as a representation of the informed judgment of the FRA on the subject of railroad safety, was preemptive in effect.

The state high court, in rejecting this overwhelming federal authority, has intruded improperly upon the jurisdiction of the FRA and the supremacy of federal law. The court's deviation from a uniform regulatory scheme is extremely significant and the impact of its decision will be

felt by numerous railroads, particularly since almost every interstate Class 1 railroad system operates in Illinois. Such a precedent, if allowed to stand, will encourage deviation from the federal regulatory scheme by other state high courts with regard to any number of other matters involving railroad operations. Nationwide regulatory uniformity ultimately could be destroyed if state high courts are allowed to reject clear federal authority in favor of a case-specific or state-specific agenda. The Illinois Supreme Court's decision thus impacts upon railroad operations nation-wide and constitutes a troubling challenge to federal supremacy.

B. Railroads Across The Nation Will Be Substantially Prejudiced If Railroad Safety Regulation Occurs On A Haphazard, Piecemeal Basis.

Consistent with Congressional policy, the FRA has pronounced "that piecemeal regulation of individual hazards [in the field of railroad operations as defined in this Policy Statement] . . . by any other agency of government would be disruptive and contrary to the public interest." 43 Fed. Reg. 10583, 10586 (1978). The legislative and judicial branches of the federal government also have reiterated the need for uniformity in the regulation of railroad operations. The unique interstate character of railroad operations necessitates uniform national regulations to avoid the state-by-state promulgation and application of varying and conflicting regulations which could unnecessarily hinder railroad operations and detrimentally affect safety.

As previously noted, the creation of federal laws specifically geared towards the railroad industry, such as the FRSA and the 1988 Act, reflects a recognition of the need for uniform federal laws and regulations to achieve a

stated national goal. Regulations promulgated by the FRA are sensitive to the unique character of the railroad industry and the industry-specific working conditions encountered by railroad employees. OSHA regulations, by contrast, are not well-suited to the railroad industry. Furthermore, OSHA regulations, unlike federal railroad regulations, can be freely modified or varied by individual state regulation. 29 U.S.C. § 667. Thus, application of OSHA regulations to railroad operations invites disruptive state interference which otherwise would be greatly hindered through the exercise of exclusive, preemptive FRA jurisdiction as Congress intended. 45 U.S.C. § 434.

Expansion of OSHA jurisdiction over operational aspects of the railroad industry will lead to improper fragmentation of railroad regulation, a result Congress sought to avoid by enacting the FRSA. OSHA regulations do not ensure national uniformity because OSHA regulations do not supersede state laws pertaining to work place hazards. *See* 29 U.S.C. § 653. Furthermore, states may displace existing OSHA jurisdiction by developing state standards. 29 U.S.C. § 667(b). On this basis, the OSH Act "gave the states the option of preempting federal regulation entirely." *Gade v. National Solid Wastes Management Ass'n*, ____ U.S. ____, 112 S. Ct. 2374, 2382 (1992). Therefore, the application of a federal OSHA regulation to a railroad jobsite does not foreclose state regulation. Instead, it invites the creation of 50 varying, and possibly conflicting, regulations on a state-by-state basis.

Congress indisputably intended the FRA to apply and enforce, in all areas of railroad operations, a set of comprehensive and uniform safety regulations. 45 U.S.C. § 421. The FRA's declarations of jurisdiction are exclusive and preemptive and have the effect of ousting both OSHA and state regulations from application. *Norfolk*, 727 F. Supp.

367; *Atchison, Topeka & Santa Fe Ry. v. Illinois Commerce Comm'n*, 453 F. Supp. 920 (N.D. Ill. 1977). If state courts are granted free reign to relegate selected railroad operational safety issues to OSHA jurisdiction, piecemeal state regulations will ensue, contrary to Congressional mandates, because OSHA jurisdiction is not exclusive. The creation of such patchwork safety regulation is fundamentally inconsistent with the interstate character of the railroad industry and is in stark contravention of clear Congressional mandates.

Haphazard, unsupported expansion of OSHA jurisdiction certainly will interfere with the efficiency of the interstate railway system. The implications of the Illinois court's decision to impose OSHA rules on railroad bridges underscores this point. The FRA has recently published safety rules providing for fall protection for railroad bridge workers. 57 FR 28116 (1992). Which agency's regulations are now to govern in Illinois? Is the industry to attempt to follow one or both?

Railroad bridge work necessarily is conducted subject to railroad train signal and control systems in a specific fashion to maintain clearances and to limit interference with train operations. The FRA is well-equipped to particularize regulations sensitive to these unique railroad operational issues, whereas OSHA, which wholly lacks expertise in railroad operations, is ill-equipped to promulgate and enforce regulations governing railroad operations. Thus, compliance with and enforcement of non-specific OSHA regulations likely would detrimentally disrupt railroad transportation.

Application of OSHA regulations to matters involving railroad operations, such as work on railroad bridges, will lead only to confusion, which ultimately could endanger

railroad workers. OSHA regulations by their very nature are general standards which apply to myriad industries. Existing, generic OSHA bridge safety regulations, for example, require that life lines, when used, "be secured above the point of operation to an anchorage." 29 C.F.R. § 1926.104. Many railroad bridges, however, do not have any anchorages above the point of operation to which a life line could be secured. Thus, the literal directives of this OSHA regulation would be difficult, if not impossible to apply safely under actual railroad working conditions.

It also is questionable whether OSHA inspectors, who lack in-depth knowledge of railroad operations, are attuned to the specific safety requirements of the railroad industry. "FRA inspectors possess extensive knowledge . . . that is essential to safely complete an inspection" of safety equipment being employed at a railroad operational worksite. 56 Fed. Reg. 3436. OSHA inspectors lack such knowledge. Moreover, "FRA inspectors often are aware of construction and repair operations in progress, and can therefore inspect" for adequate safety equipment in a timely fashion. 56 Fed. Reg. 3436. FRA inspectors also frequent railroad worksites to inspect the work in progress, and they logically are able to assess worker safety at the same time. OSHA, by contrast, whose inspectors do not routinely monitor the operations of the railroad industry, may not be aware of a railroad construction or repair operation in time to send an inspector. Finally, FRA reporting requirements govern injuries to railroad employees working on railroad bridges, and FRA maintains information concerning the occurrence of railroad injuries. Accordingly, FRA is well-equipped to inspect and evaluate injury occurrences and to determine adequate and appropriate forms of redress. OSHA, on the other hand, does not gather or maintain such information. Clearly, uniform

regulation of railroad operational safety by the FRA, in accordance with Congressional mandate, is preferable to non-uniform regulation by OSHA and the states.

Deviation from the longstanding system of national, uniform railroad safety regulation will place a substantial financial strain on the nation's railroads. Following the lead established by the Illinois "precedent," other states may attempt to carve out their own exceptions to the national norm, first declaring OSHA jurisdiction over an aspect of railroad safety, and then modifying or varying the OSHA regulation to satisfy a local agenda. *See Gade*, 112 S. Ct. at 2832. Expenditures will soar and confusion will propagate as the railroads attempt to keep abreast of and comply with the numerous standards that will vary from state-to-state. The shipping public will bear the brunt of increased costs incurred by the breakdown of the uniform regulatory scheme, and railroads and employees alike will bear the brunt of the resulting confusion.

These very considerations confirm the wisdom of Congress in adopting the FRSA and its amendment as a uniform national paradigm for railroad safety regulation. Reasons of public policy, as well as legislative intent and industry needs, compel this Court to reaffirm the uniform regulatory scheme established by Congress.

C. Established Principles Of Federal Supremacy And Justice Mandate The Preservation Of Uniform Regulation Of Railroad Operating Safety.

Congress repeatedly has reaffirmed its commitment to a "uniform body of regulations and enforcement" in the railroad industry. H.R. Report No. 91-1194, U.S. Cong. and Ad. News 4104, 4111 (1970). The ceding of jurisdiction to OSHA of safety issues inherent in railroad operations will allow state regulation over the same working

conditions because OSHA jurisdiction is not exclusive. 29 U.S.C. § 667. The development of myriad state regulations not only is unduly burdensome to the railroad industry, as previously discussed, but it also is directly contrary to clear Congressional intent. *See* 29 U.S.C. § 421. Such derogation of federal law violates traditional principles of federal supremacy and is unacceptable.

The decision of the state high court represents a disturbing rejection of overwhelming contrary federal authority and an unprecedented venture into *ad hoc* drawing of jurisdictional lines between the FRA and OSHA with attendant uncertainty in the railroad industry. The state high court accepted as "controlling," language in the preamble to the FRA's 1991 Notice of Proposed Rulemaking in which the FRA reinterpreted its 1978 Policy Statement thirteen years after the fact.

The Petitioner railroad acted in reliance on the FRA's 1978 Statement that the FRA exercised exclusive jurisdiction over railroad bridges. Nevertheless, in the face of contrary federal decisional law, the state high court affirmed the error of the trial court despite its obligation to defer to federal decisional law in a case arising under the FELA. *Dice v. Akron, C & Y R.R.*, 342 U.S. 359, 361 (1952). In derogation of binding federal policy, the state high court assigned a non-binding notice high precedential value. Finally, in contravention of clear federal legislation conferring jurisdiction over railroad bridge safety upon the FRA, the state high court determined that OSHA jurisdiction existed and that the Petitioner could be found negligent for violating OSHA regulations.

That a majority of the Illinois Supreme Court confirmed the erroneous rulings of the trial court demonstrates that state-by-state determinations of which regulations govern railroads present actual, serious risks, and not just per-

ceived risks of future mischief. Such risks only can be redressed by this Court. Replication of this case by other state high courts will endanger principles of federal supremacy and will enable litigants to "forum shop" to achieve different results depending upon whether the case is filed in state or federal court. The decision of the Illinois Supreme Court is a direct challenge to the supremacy of the federal government which could endanger the efficacy of the national railway transportation system. Guidance of this Court on the proper roles of the FRA and OSHA in the area of railroad safety regulation is necessary to prevent future occurrences of piecemeal determinations by state courts.

Of even more fundamental concern to the nation's railroads (AAR's members), is the challenge presented to basic concepts of justice by the state high court's decision. This nation's railroads have an interest in relying upon clearly defined governmental laws and regulations to which they must conform their conduct. Regulations and standards applicable to railroads must be defined in advance if the railroads are to conform their conduct to such regulations. It is abhorrent to our system of justice that a railroad whose conduct conforms with the mandates of the FRA and Congressional policy, as enacted in the FRSA, can be held *after the fact* to have violated OSHA regulations which the FRA had preempted by its 1978 Policy Statement. The states must not be given unrestricted discretion to determine that a specific OSHA regulation applies to a railroad, based mainly on an FRA administrator's renunciation of his predecessor's policy after more than a decade has passed, and without public process or accountability. This Court should not allow to stand the Illinois Supreme Court's decision in this case which invites the lower courts of Illinois and the courts of other states to trample on basic concepts of fundamental fairness

and due process. The special and important questions of federal law presented in this matter merit consideration by this Court.

CONCLUSION

Although the judicial, legislative and executive branches of the federal government have established and reiterated the FRA's exclusive jurisdiction over safety issues intrinsic to railroad operations, the state high court, on the basis of an agency's policy reversal long after the operative facts before it, held that generic safety regulations promulgated by a separate federal agency applied to this case involving railroad bridge operations. The state high court's decision totally rejects the uniformity of national railroad laws and regulations thoughtfully created by the federal government over the course of a century.

On the basis of the foregoing, amicus curiae, Association of American Railroads, respectfully requests this Court to grant Petitioner's Petition for Writ of Certiorari and to reverse the judgment of the Supreme Court of Illinois.

Respectfully submitted,

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v.

TRACY TEMPLETON,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Illinois

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Did the Federal Railroad Administration, in a Policy Statement issued in 1978, preempt OSHA from enforcing its "fall protection" regulations as to railroad bridge work.

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No. 92-1428

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

CHICAGO AND NORTH WESTERN TRANSPORTATION COMPANY,

Petitioner,

v.

TRACY TEMPLETON,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Illinois

RESPONDENT'S BRIEF IN OPPOSITION

INTRODUCTION

In its opinion below, the Illinois Supreme Court carefully addressed each of North Western's assignments of error, including its claim that the OSHA "fall protection" regulations should not have been admitted as evidence of negligence because the FRA had preempted those regulations from being applied to bridge work. In reaching its conclusion that the OSHA regulations were properly admitted, the Illinois Supreme Court applied settled federal precedent and long established principles of judicial interpretation with regard to the determination of an administrative agency's intent.

North Western now seeks to have this Court review the Illinois Supreme Court's decision. Cognizant of this Court's enumeration of the factors necessary to invoke certiorari jurisdiction, North Western attempts to bring the Illinois Supreme Court's opinion in conflict with federal precedent. However, that attempt is unavailing. Not only do those cases fail to support North Western's position, but none of them even considered the OSHA "fall protection" regulations at issue in this case.

Further, North Western attempts to portray this case as one which involves an important question of federal law which needs to be settled by this Court. However, the specific issue posed, whether FRA has preempted OSHA from enforcing its fall protection regulations on railroad bridges, has been resolved for future cases by the FRA's adoption of its own "fall protection" regulations which took effect on August 24, 1992. 57 Fed.Reg. 28116 (1992). Given the FRA's express exercise of authority over this working condition in 1992, there is no doubt that today OSHA is precluded from enforcing its fall protection regulations in the railroad industry. Therefore, the effects of any action taken by this Court will be felt in this case alone. There is no important question of federal law that needs to be settled by this Court.

In short, North Western's Petition for Writ of Certiorari does not establish a need for this Court's review. The Petition for Writ of Certiorari should be denied.

STATEMENT OF FACTS

Tracy Templeton, was an employee of the Chicago & North Western Transportation Company (North Western). On January 27, 1984, Mr. Templeton was severely injured

when he fell 31 feet through an opening in the deck of a railroad bridge. Contrary to North Western's fact statement, Mr. Templeton was not provided with any fall protection devices such as safety belts or nets. The evidence revealed that there were no nets and only two safety belts available for the seven member crew. The two safety belts were reserved for the exclusive use of those who had to work beneath the bridge deck. (Trial transcript, pp. 551-52, 554).

PROCEEDINGS IN THE TRIAL COURT

At trial, Respondent offered into evidence industry standards on fall protection from the Burlington Northern Railroad, the Union Pacific Railroad, the National Safety Council, the U.S. Army Corp of Engineers and OSHA. Those standards were virtually identical to each other and required that fall protection devices in the form of nets or safety belts be used whenever a worker is working higher than twenty-five feet above any work surface.

Of the five fall protection standards offered in evidence, North Western only objected to the admission of the OSHA standards. Its objection was based on its belief that a Policy Statement issued by the FRA in 1978 preempted OSHA from enforcing its "fall protection" regulations as to railroad bridge work. 43 Fed.Reg. 10583-90 (1978). The trial court considered all arguments and concluded that the Policy Statement did not preempt OSHA from enforcing those regulations on railroad bridges. The trial court admitted those regulations as evidence of negligence. The jury returned a verdict for Respondent in the amount of 3.5 million dollars after a reduction for the jury's finding that he was 14% negligent.

PROCEEDINGS IN THE ILLINOIS APPELLATE COURT

North Western appealed from the trial court's judgment. In 1991, during the pendency of that appeal, the FRA issued a Notice of Proposed Rulemaking (NPRM) in which it confirmed that OSHA's fall protection regulations had not been preempted by the 1978 Policy Statement. 56 Fed.Reg. 3434-41 (1991).

The appellate court misread the 1978 Policy Statement and reversed the judgment of the trial court without addressing the specific language in the 1991 NPRM wherein the FRA confirmed the trial court's reading of the Policy Statement.

PROCEEDINGS IN THE ILLINOIS SUPREME COURT

The Illinois Supreme Court recognized the error made by the appellate court and granted leave to appeal. The high court looked unsuccessfully to the 1978 Policy Statement to determine if it contained an answer to the question of whether OSHA's fall protection regulations were preempted from railroad bridge work. Therefore, the court relied upon the 1991 NPRM as a valid expression of FRA intent. The Illinois Supreme Court correctly paid deference to the 1991 NPRM and reversed the judgment of the appellate court.

REASONS FOR DENYING THE WRIT

I. THE ILLINOIS SUPREME COURT'S OPINION IS CONSISTENT WITH BOTH THE LEGISLATIVE AND REGULATORY SCHEMES WITH REGARD TO THE JURISDICTIONAL BOUNDARIES BETWEEN FRA AND OSHA

In its attempt to create an important question of federal law North Western claims that the decision of the Illinois Supreme Court promotes "overlapping OSHA/FRA jurisdiction over railroad operations in derogation of national transportation policy." (Pet. at 14).[1] To the contrary, the Illinois Supreme Court's opinion is entirely consistent with that policy.

In 1970, Congress passed the Occupational Safety and Health Act. 29 U.S.C. §651 *et seq.* While Congress wanted to avoid duplication of regulatory efforts by OSHA and other administrative agencies, it had an even greater desire to avoid safety problems created by gaps in regulation. *Southern Pacific Transp. Co. v. Usery*, 539 F.2d 386, 392 (5th Cir. 1976), *cert. denied*, 434 U.S. 874 (1977). With this in mind, Congress drafted Section 4(b)(1) of OSHA so as to prevent an industry from being exempt from OSHA regulation until the federal agency responsible for that industry actually exercised its authority to provide safety. Section 4(b)(1) of OSHA provides that regulations promulgated thereunder shall not apply to "working conditions of employees with respect to which other Federal agencies . . . exercise statutory authority to prescribe or enforce standards." 29 U.S.C. §653(b)(1).

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[1] References to the Petition for Certiorari are noted as "(Pet. at p. ____)." Page numbers in parenthesis preceded by "A" refer to pages from North Western's Appendix.

The FRA has never exercised its statutory authority to the extent of totally displacing OSHA. Rather, the FRA has expressly embraced overlapping jurisdiction of OSHA and the FRA as to railroad safety. In its 1978 Policy Statement the FRA conceded that OSHA, with its comprehensive standards, was better suited than the FRA to provide safety for many aspects of the railroad industry. North Western, however, failed to include that portion of the Policy statement in its Appendix:

> [G]iven the present staffing level for field investigation and inspection, the FRA has determined that, at this time, it would not be in the best interests of the public and of railroad safety for this agency to become involved extensively in the promulgation and enforcement of a complex regulatory scheme covering in minute detail, as do the OSHA standards, working conditions which, although located within the railroad industry, are in fact similar to those of any industrial workplace. Rather, we believe that the proper role for FRA in the area of occupational safety in the immediate future is one that will concentrate our limited resources in addressing hazardous working conditions in those traditional areas of railroad operations in which we have special competence.

43 Fed.Reg. at 10585.

Further, contrary to North Western's assertion, nothing in the Illinois Supreme Court's decision conflicts with federal precedent delineating the jurisdictional relationship between OSHA and the FRA. The Respondent, Petitioner and the Illinois Supreme Court all agree with existing federal precedent that the regulations promulgated under the OSH Act are inapplicable when an industry-specific agency, such as the FRA, actually exercises its authority over the same working condition covered by an OSHA regulation or specifies that such working condition should go

unregulated. The sole issue in this case is not whether the FRA *can* preempt OSHA, but whether or not it had done so in 1978 with regard to the "fall protection" regulations.

It is clear that the Illinois Supreme Court was aware of and acted within the confines of the legislative and regulatory framework as to the boundaries of OSHA/FRA jurisdiction.

II. FEDERAL PRECEDENT DOES NOT SUPPORT A TERRITORIAL APPROACH TO FRA REGULATION

North Western contends that federal precedent has established a territorial approach to preemption such that whenever the FRA exercises its statutory authority over a particular working condition within a given "environmental area" such as bridges, that operates to preempt OSHA from regulating any other working condition within that "environmental area." (Pet. at 16). Such is not the law.

This same contention was considered and rejected in *Southern Pacific Transp. v. Usery*, 539 F.2d 386 (5th Cir. 1976), *cert. denied*, 434 U.S. 874 (1977), because such an approach could result in preemption beyond that actually intended by the FRA. 539 F.2d at 391, n. 10.

Further, one year after *Usery*, the FRA issued its 1978 Policy Statement expressly rejecting this type of "territorial" approach as unworkable. The FRA stated:

> FRA has determined that a territorial approach to the exercise of its statutory jurisdiction over railroad safety such as that proposed in the NPRM would deplete energies and resources better devoted to the safety of railroad operations.

43 Fed.Reg. at 10587 (p. A51).[2]

Given the FRA's rejection of the territorial approach to regulation, it is incorrect to assert that the FRA's exercise of authority over one aspect of bridge work preempts OSHA from regulating all other aspects of bridge work. The Illinois Supreme Court's opinion is consistent with all federal decisions on the issue of FRA's displacement of OSHA regulation.

III. THE FRA'S 1978 POLICY STATEMENT DID NOT PREEMPT OSHA FROM ALL ASPECTS OF BRIDGE WORK

North Western contends that in the 1978 Policy Statement the FRA declared that no OSHA regulations may be enforced on railroad bridges. In support of this contention North Western takes eight words, out of context, from the six page Policy Statement, "*OSHA regulations would not apply to . . . railroad bridges*," and states that those words "plainly include railroad bridges within the FRA's exclusive jurisdiction." (Pet. at 17). This statement is untrue.

Section C of the 1978 Policy Statement is entitled "OSHA Jurisdiction". 43 Fed.Reg. at 10587 (p. A51). In that section of the Policy Statement the FRA analyzes sixteen subparts of OSHA, stating generally whether or not those subparts would apply to the railroad industry. With regard to "Subpart D, walking-working surfaces," the FRA stated that those regulations would apply to railroads with

[2] Both the official citation and the corresponding page number in North Western's Appendix are provided where available.

three exceptions.[3] The pertinent portion of that section is set out below:

> WALKING-WORKING SURFACES
> (SUBPART D)
>
> OSHA regulations concerning working surfaces deal with such matters as ladders, stairways, platforms, scaffolds and floor openings. Generally, these regulations are applicable in railroad offices, shops, and other fixed work places. There are three principal exceptions to the rule. First, they would not apply with respect to the design of locomotives * * *
>
> Second * * * OSHA regulations on guarding of open pits, ditches, etc., would not apply to inspection pits in locomotive or car repair facilities. * * *
>
> Third, the OSHA regulations would not apply to ladders, platforms, *and other surfaces* on signal masts, cantenary systems, railroad bridges, turntables, and similar structures or to walkways beside the tracks in yards or along the right-of-way.

43 Fed.Reg. at 10587 (p. A53) (emphasis added).

It is from the third exception that North Western quotes the words, "OSHA regulations would not apply to . . . railroad bridges." Placing these words in context makes it clear that the only regulations being referred to are the "walking-working surface" regulations. This is precisely the reading given this language by the court in *Southern Pacific Transp. Co. v. Public Utilities Comm'n of California*, 647 F.Supp. 1220, 1224, *aff'd per curiam*, 820 F.2d 1111 (9th Cir. 1987).

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[3] OSHA's "walking-working surface" regulations deal with the guarding of openings and require the use of railings, toeboards and hole covers to be placed over or around an opening in a floor or wall surface. See, 29 C.F.R. §1910.23.

North Western's interpretation of this passage violates all rules of grammar and syntax. Taking words from the FRA's discussion of one subpart of OSHA and applying them to all subparts defeats the FRA's purpose in discussing those subparts separately. In effect, North Western has rewritten the Policy Statement to support its position.

More importantly, the FRA, in the only interpretive statement it has issued on this topic, has itself confirmed that North Western has misread this language. In a Notice of Proposed Rulemaking (NPRM) dated January 30, 1991, the FRA considered the necessity of promulgating its own fall protection regulations and the adequacy of what it referred to as the "currently applicable OSHA fall protection regulations." 56 Fed.Reg. at 3434 (1991) (p. A67). In the 1991 NPRM the FRA expressly stated that the 1978 Policy Statement did not preempt the OSHA fall protection regulations and that the words, "OSHA regulations would not apply to . . . railroad bridges" only referred to the "walking-working surface" regulations, not the "fall protection" regulations. The FRA stated:

> As this segment of the Policy Statement indicates, FRA intended to displace OSHA regulations with respect to the *surfaces* on bridges, *i.e.*, track structures, *but did not intend* to prevent OSHA from exercising its more general responsibilities for the safety of railroad workers with respect to *fall protection* and respiratory equipment.

56 Fed.Reg. at 3435 (p. A70) (emphasis added).

It is clear that the preempting language from the 1978 Policy Statement relied upon by North Western did not apply to the OSHA fall protection regulations.

IV. THE ILLINOIS SUPREME COURT CORRECTLY RELIED ON THE 1991 NPRM TO INTERPRET THE 1978 POLICY STATEMENT

Contrary to North Western's assertion, the 1978 Policy Statement did not preempt OSHA from regulating all aspects of railroad bridge work, but instead limited preemption to those aspects involving "railroad operations." Since the Policy Statement did not address the question of whether the OSHA fall protection regulations affected the safety of railroad operations, the Illinois Supreme Court properly relied on the FRA's 1991 statement on that point. 603 N.E.2d at 444-45 (pp. A7-8).

The OSHA "fall protection" regulations are part of the personal protective equipment regulations contained in the OSHA construction standards. 29 C.F.R. 1926.104-1926.105. In the Policy Statement the FRA stated that the construction standards apply to railroads except to the extent that they affect the safety of "railroad operations." 43 Fed. Reg. at 10589 (p. A58). "Railroad operations" were defined as the "movement of equipment over the rails." 43 Fed. Reg. at 10585 (p. A46). However, the Policy Statement did not review each construction standard to determine if, in fact, any of those standards did affect railroad operations.

The Illinois Supreme Court recognized that the Policy Statement did not address the issue of whether the OSHA fall protection regulations affected the safety of railroad operations. 603 N.E.2d at 443 (p. A6). Consequently, the Illinois court properly looked outside the Policy Statement for guidance as to the FRA's intent. *Gardebring v. Jenkins*, 485 U.S. 415, 429-30 (1988). The court looked to the FRA's statement in the 1991 NPRM that the fall protection regulations had not been preempted. The court concluded

that the NPRM was a fair interpretation of the 1978 Policy Statement and granted it the deference it legally deserved. 603 N.E.2d at 444-45 (pp. A7-8).

V. THE DISSENTING OPINION IN THE STATE COURT MISINTERPRETED THE 1978 POLICY STATEMENT

North Western naturally places great reliance in the state court's dissenting opinion. However, the dissent has also misread the 1978 Policy Statement with regard to the language "OSHA regulations would not apply to . . . railroad bridges." 603 N.E.2d at 446 (p. A13). Obviously the dissent has no more right than does North Western to take language out of context and apply it in areas not intended by the FRA.

The dissent also misreads the 1978 Policy Statement with respect to the FRA's desire to avoid "piecemeal regulation of individual hazards". 603 N.E.2d at 446 (p. A13). The dissent reasons that the "fall protection" regulations and the "walking-working surface" regulations are both intended to prevent the same hazard, *i.e.*, falls. Therefore, the dissent criticizes the majority's opinion as giving rise to piecemeal regulation of the same hazard. The error in the dissent's reasoning is that it fails to note that when the FRA stated that it did not want piecemeal regulation of the same hazard, it was only referring to hazards which affect railroad operations.

A look at that portion of the Policy Statement where this language came from is revealing. Consistent with its statements throughout the 1978 Policy Statement, in this section the FRA was again expressing its intent that it alone would regulate hazards which affected railroad operations. The FRA stated:

EXERCISE OF FRA JURISDICTION OVER RAILROAD OPERATIONS

> The overall FRA program to assure the safety of railroad operations may be generally subdivided into three fields: (1) Track, roadbed, and associated devices and structures, (2) equipment, and (3) human factors. FRA has now exercised its statutory authority with respect to each of these regulatory fields by actual rulemaking. While it is expected that additional regulatory initiatives may be undertaken, as necessary, in each of the major regulatory fields, it is the judgment of the agency that piecemeal regulation of individual hazards in any of the three regulatory fields by any other agency of government would be disruptive and contrary to the public interest.
>
> * * *
>
> Therefore, as the primary regulatory agency, FRA has exercised and continues to exercise its jurisdiction over the safety of railroad operations.

43 Fed.Reg. at 10586 (p. A48).

The Policy Statement then goes on to describe the dimensions of the three regulatory fields occupied by the FRA. With respect to track, roadbed and associated structures and devices, the FRA stated:

> The FRA Track Safety Standards (49 CFR Part 213) prescribe geometric and other technical standards for track structures and roadbed and require a program of inspections. While standards have not been issued related to the dimensions or structural integrity of bridges, tunnels or other similar structures, FRA is exercising its authority with respect to the operational safety of such structures through inspections in response to specific requests and may undertake rulemaking proceedings at a future date.

43 Fed.Reg. at 10586 (p. A49).

Clearly the FRA's exercise of authority over track structures, including bridges, was restricted to "geometric and other technical standards" related to their dimensions and structural integrity. These are areas which the FRA considered "operational". It is in these operational areas that the FRA wished to avoid piecemeal regulation. The walking-working surface regulations require the use of surface obstructions such as railings and toeboards. Because those items can affect the movement of equipment over the rails, the FRA determined that it was the agency best suited to regulate the hazards associated with those surface regulations. 43 Fed.Reg. at 10587 (p. A54).

The OSHA fall protection regulations, on the other hand, do not affect the movement of equipment over the rails and, therefore, do not affect railroad operations. *Secretary of Labor v. Consolidated Rail Corp.*, OSHRC Docket No. 78-2119, *aff'd on other grounds*, 9 OSHC 1892 (1981).[4] Consequently, OSHA's regulation of fall protection does not result in piecemeal regulation of a railroad operating hazard. The fall protection regulations simply have nothing to do with railroad operations.

There is both logic and reason in the FRA's distinction between operational and nonoperational hazards. The dissent cannot substitute its limited knowledge of the hazards presented for that of the agency charged with that specific responsibility.

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[4] A certified copy of this unpublished decision appears at page one of Respondent's Appendix.

VI. FEDERAL CASE LAW DOES NOT SUPPORT FRA'S EXCLUSIVE JURISDICTION OVER RAILROAD BRIDGES

In an attempt to persuade this Court that the Illinois Supreme Court's opinion conflicts with federal precedent, North Western cites three cases which it claims held that OSHA was preempted from regulating all aspects of work performed on railroad bridges. However, none of those cases so hold.

The first case cited by North Western is *Velasquez v. Southern Pacific Transp. Co.*, 734 F.2d 216 (5th Cir. 1984). (Pet. at 22). However, the Illinois Supreme Court carefully reviewed *Velasquez* and found it was distinguishable on its facts. 603 N.E.2d at 445 (pp. A9-10). In *Velasquez*, the plaintiff fell from a railroad bridge nine feet to the ground below. The OSHA fall protection regulations only apply to work done at heights above 25 feet. Therefore, the *Velasquez* court was not faced with the issue of whether OSHA fall protection regulations were applicable to railroad bridges. Rather, that case dealt exclusively with the issue of whether OSHA "walking-working surface" regulations applied to walkways on railroad bridges.

In a footnote which is purely *dicta*, the *Velasquez* court stated that the 1978 Policy Statement displaces the OSHA construction standards "in this case". 734 F.2d at 218, n. 1. In making this gratuitous comment, the court failed to follow the FRA's admonition that the OSHA construction standards would be preempted only to the extent that they fell "within FRA's exercise of authority relating to the safety of railroad operations." 43 Fed.Reg. at 10589 (p. A58). Since the *Velasquez* court never looked at the OSHA construction standards individually to determine which, if any, affected the safety of railroad operations,

it had no basis for displacing the entire set of those standards.

Further, even if the *Velasquez* court incorrectly read the Policy Statement to preclude all OSHA regulations from railroad bridges, that portion of its decision lost all meaning in light of the 1991 NPRM wherein the FRA confirmed that such a reading was incorrect. After all, it is the agency's intent, not the court's, which controls the scope of preemption. *Southern Pacific Transp. Co. v. Usery*, 539 F.2d 386, 392 (5th Cir. 1976), *cert. denied*, 434 U.S. 874 (1977). Given the unequivocal pronouncement of FRA intent in the 1991 NPRM, even the *Velasquez* Court would have to concede that the OSHA fall protection regulations were not preempted by the 1978 Policy Statement.

The second case cited by North Western, *Norfolk & W. Ry. v. Public Utilities Comm'n of Ohio*, 727 F.Supp. 367, *aff'd*, 926 F.2d 567 (6th Cir. 1991), only concerned the issue of whether the FRA had preempted individual states from requiring walkways on bridges. It did not discuss jurisdiction over working conditions on bridges. Since the FRA rejected a "territorial" approach to regulation, the fact that it exercised its jurisdiction as to walkways on bridges says nothing as to its position regarding other aspects of bridge work.

Finally, North Western cites *Norfolk & W. Ry. v. Burns*, 587 F.Supp. 161 (S.D. Mich. 1984). That case does not support complete preemption of OSHA regulations on bridges. In *Burns*, the railroad was cited for the improper storage of material on a walkway beside the track. 587 F.Supp. at 163. The court concluded that the 1978 Policy Statement only preempted regulations which would affect the actual surface condition of the walkway, not those regula-

tions aimed at controlling nonoperational hazards. 587 F.Supp. at 170-71. *Burns* illustrates the FRA's intent with respect to overlapping jurisdiction of certain work areas with respect to operational versus nonoperational hazards.

North Western also relies upon the OSHA Review Commission case of *Secretary of Labor v. Consolidated Rail Corp.*, 10 OSHC 1577 (1982). However, that case dealt exclusively with whether OSHA "walking-working surface" regulations were applicable to the guarding of open-pits in locomotive repair shops. 10 OSHC at 1580. Nowhere in that decision did the Review Commission discuss the applicability of any OSHA regulations to railroad bridge work.

Moreover, North Western fails to discuss the OSHA Review Commission case of *Secretary of Labor v. Consolidated Rail Corp.*, OSHRC Docket No. 78-2119, *aff'd on other grounds*, 9 OSHC 1892 (1981), which specifically held that the 1978 Policy Statement did not preempt the OSHA fall protection regulations. (RA at 1).[5]

In that case the railroad was cited by OSHA for failing to provide safety belts to workers who were engaged in repairing a bridge deck 34 feet above the ground. (RA at 4-5). The railroad argued that it was exempt from the OSHA fall protection regulations because the 1978 Policy Statement had preempted OSHA from applying its safety regulations to bridges. (RA at 7). The administrative law judge rejected this claim because the railroad failed to show that the fall protection regulations affected railroad operations. The ALJ stated:

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[5] References to Respondent's Appendix are noted as "(RA at ____)."

> The hazardous working conditions in this case did not fall within any purported exercise of FRA's authority relating to the "safety of railroad operations" which would prevent OSHA's standards from applying.[6]

(RA at 8-9) (emphasis added).

The Illinois Supreme Court opinion clearly does not conflict with any precedent with regard to preemption of OSHA regulations on railroad bridges. As such the Petition for Writ of Certiorari should be denied.

VII. THERE ARE NO STATEMENTS OF FRA INTENT WHICH ARE INCONSISTENT WITH THE ILLINOIS COURT'S OPINION

North Western contends that the opinion of the Illinois Supreme Court conflicts with "all reasonably contemporaneous expressions of FRA intent" which establish FRA's exclusive jurisdiction over all work performed on railroad bridges. (Pet. at 18). However, none of the "expressions" cited by North Western in support of this contention discuss working conditions on railroad bridges.

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[6] The railroad appealed this decision to the full Commission. The Commission affirmed, but on the ground that the Policy Statement was not a valid exercise of FRA authority. The full Commission never even considered the lower judge's ruling that the fall protection regulations did not affect the safety of railroad operations. 9 OSHC 1892 (1981).

One year later, in a totally different action, *Secretary of Labor v. Consolidated Rail Corp.*, 10 OSHC 1577 (1982), the full Commission expressly overruled the basis for its affirmance in the earlier *Consolidated Rail* case and held that the 1978 Policy Statement was a valid exercise of FRA authority. However, that decision did not question the lower court's original finding that the 1978 Policy Statement did not preempt the OSHA fall protection regulations.

The first "expression" of FRA intent cited by North Western is a memorandum from the General Counsel of the Department of Transportation concerning the FRA's interpretation of Section 4(b)(1) of OSHA. (Pet. at 19). This memorandum, which deals solely with an FRA/OSHA dispute as to how, in general, preemption could be effected, does not discuss exclusive jurisdiction over all work performed on railroad bridges.

North Western next cites two FRA announcements which deal with the issue of whether the FRA should require the installation of walkways on all railroad bridges. (Pet. at 19). Neither of those announcements discuss the issue of whether the FRA retained exclusive jurisdiction over all working conditions on railroad bridges.

North Western claims that in the case of *Secretary of Labor v. Consolidated Rail Corp.*, 10 OSHC 1577 (1982), the OSHA Review Commission agreed that the FRA had assumed exclusive control over bridges. However, the sole issue in that case was whether the FRA's 1978 Policy Statement preempted OSHA's walking-working surface regulations from being applied in locomotive repair shops. 10 OSHC at 1578-79. That case had nothing whatsoever to do with railroad bridges.

North Western's reliance on the letter of then FRA Administrator, John M. Sullivan, which was noted by the Review Commission in the *Consolidated Rail* case, similarly fails to aid North Western's argument. 10 OSHC at 1579, n. 8. That letter simply repeats what the FRA had stated in the 1978 Policy Statement, *i.e.*, that the FRA has exercised its jurisdiction over "railroad operations." (Pet. at 20). The letter does not announce FRA's exclusive jurisdiction over railroad bridges.

The next expression of "contemporaneous" FRA intent cited by North Western is a letter dated March 7, 1989, from the Assistant Chief Counsel for Safety of the FRA to the Associate Solicitor for the Department of Labor. (Pet. at 20). Ostensibly, this letter was meant to respond to a specific question posed by OSHA, to wit: "Does [FRA] have regulations to ensure that fall protection equipment is provided where appropriate?" FRA counsel answered that question in the negative, but with the proviso that because of the Congressional mandate contained in the Rail Safety Improvement Act of 1988, "we expect to publish in the near future a Notice of Proposed Rulemaking concerning the safety of railroad employees working on bridges." (p. A82). North Western asserts that this response is indicative of FRA's intent in 1978 "that fall protection for railroad bridge workers should not concern OSHA." (Pet. at 20). Respondent is at a loss to explain how a letter drafted in 1989, expressing FRA's intent to regulate fall protection in the future, has any relevance to the FRA's position on preemption of OSHA fall protection regulations in 1978.

North Western also points to one section of the Rail Safety Improvement Act of 1988, 45 U.S.C. §431(n) (1988), which required the FRA to promulgate safety regulations for workers on bridges, including regulations as to walkways, safety belts and nets. However, the Respondent has never contested the FRA's *authority* to regulate bridge safety. That section of the Act merely serves to demonstrate Congressional recognition of the FRA's *failure to exercise that authority* and a mandate to it to do so.

Finally, North Western contends that the FRA's issuance of fall protection regulations in 1992 indicates FRA's belief, in 1978, that OSHA's fall protection regulations affected railroad operations. However, this contention is

directly contradicted by the FRA's statement in the 1991 NPRM. There, the FRA stated that through the issuance of its own fall protection regulations it was now "extending its authority" to all aspects of railroad bridge worker safety, "both operational and otherwise." 56 Fed.Reg. at 3435-36 (p. A71). This clearly establishes that the FRA has never considered "fall protection" to be an operational concern.

Contrary to North Western's position, the Illinois Supreme Court opinion in no way conflicts with any statement of FRA intent. Rather, that opinion is entirely consistent with the 1991 NPRM.

VIII. THE 1991 NPRM IS ENTITLED TO GREAT DEFERENCE

In it's 1991 NPRM the FRA put to rest any question there might be with regard to the applicability of OSHA's fall protection regulations by expressly stating that the 1978 Policy Statement did not preempt those regulations. Faced with this unequivocal statement, North Western attempts to dilute its importance by labelling it a "retroactive interpretation" which is not entitled to any weight. North Western is in error. The 1991 NPRM is the only statement of intent ever issued by the FRA with regard to fall protection. As such, it should be given great deference by the courts.

A. THERE IS NO PER SE RULE AGAINST UTILIZING AN AGENCY'S SUBSEQUENT INTERPRETATION OF ITS OWN REGULATION

North Western contends that the 1991 NPRM is not worthy of this Court's deference because it is not a contemporaneous interpretation of the Policy Statement.

However, North Western fails to cite a single case which holds that an agency's interpretation must be contemporaneous in order to be considered as evidence of the agency's intent.

An agency's interpretation of its own policy is entitled to great deference. *Udall v. Tallman*, 380 U.S. 1, 16 (1965). A court need not find that an agency's interpretation of its regulation is the only possible one, or even the one that the court would have adopted in the first instance. *San Luis Obispo v. NRC*, 789 F.2d 26, 30 (D.C. Cir. 1986). As this Court repeated in *Udall*:

> [A] court must necessarily look to the administrative construction of [a] regulation if the meaning of the words used is in doubt. * * * [T]he ultimate criterion is the administrative interpretation, which becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation.

380 U.S. at 16-17, quoting from *Bowles v. Seminole Rock Co.*, 325 U.S. 410, 413-14 (1945).

The 1991 NPRM is merely the FRA's attempt to clarify an earlier FRA pronouncement which had only been intended as a guideline and not as a definitive statement of FRA's position regarding preemption of each individual OSHA regulation. The FRA included the following precaution in the Policy Statement:

> This discussion cannot be regarded as definitive, since considerable experience in adjusting the relationship of FRA and OSHA standards will likely be required before an optimum Federal regulatory program can be achieved. All statements concerning OSHA and FRA authority and the applicability of individual regulations should be regarded as statements of general principle.

43 Fed.Reg. at 10587 (p. A52).

In this way the FRA gave notice to the regulated community that the general principles contained in the Policy Statement were subject to future interpretation. In 1991, the FRA felt it appropriate to issue such an interpretation in its NPRM. This is clearly proper. *Gardebring v. Jenkins*, 485 U.S. 415, 429-30 (1988); *Youakim v. Miller*, 425 U.S. 231, 235 (1976), *aff'd after remand*, 440 U.S. 125 (1979).

In both *Gardebring* and *Youakim* this Court paid great deference to the agencies' interpretations of their own rules which had been issued *after* the litigation in those cases was initiated. In *Gardebring*, the administrative agency was actually a party to the litigation, yet, despite this fact, this Court noted that when it comes to an agency's subsequent interpretation of its own regulation, courts should be:

> hesitant to substitute an alternative reading for the [agency's] unless that alternative reading is compelled by the regulation's plain language or by other indications of the [agency's] intent at the time of the regulation's promulgation.

485 U.S. at 430.

North Western cites five cases which it claims held that subsequent administrative interpretations are not entitled to significant weight. (Pet. at 24). However, none of those cases so held. Three of those cases merely state that an agency's interpretation cannot be used to determine the meaning of a statute which is clear on its face. *Order of Railway Conductors v. Swan*, 152 F.2d 325 (7th Cir. 1945), *aff'd*, 329 U.S. 520 (1947); *Land O'Lakes Creameries, Inc. v. Commodity Credit Corp.*, 265 F.2d 163 (8th Cir. 1959); and *Drew v. Lawrimore*, 257 F.Supp. 659 (D.C.S.C. 1966). The 1978 Policy Statement was not intended as a final

resolution of all questions concerning FRA's preemption of OSHA regulations. Therefore, the 1991 NPRM is not interpreting a regulation that is clear on its face, but rather one that was clearly subject to future interpretation.

The remaining two cases cited by North Western do not involve agency interpretation, but rather deal with the role of *subsequent legislative history* in the interpretation of a statute. *Matter of Sinclair*, 870 F.2d 1340 (7th Cir. 1989); *Wisconsin Cheesemen, Inc. v. United States*, 388 F.2d 420 (7th Cir. 1968). Regardless of the value placed on subsequent legislative history, this Court has recognized the value of an agency's subsequent interpretation of its own regulation. *Gardebring*, 485 U.S. at 430.

In the present case, the plain language of the 1978 Policy Statement does not conflict with the 1991 NPRM. Further there are no earlier FRA pronouncements which conflict with the 1991 NPRM, that being the *only* expression of FRA intent ever issued on this subject. As such, it was totally appropriate to consider the 1991 NPRM as evidence of the FRA's intent with respect to OSHA fall protection.

B. THE 1991 NPRM IS NOT A RETROACTIVE INTERPRETATION OF THE 1978 POLICY STATEMENT

North Western asserts that the 1991 NPRM is a retroactive interpretation of the FRA's 1978 Policy Statement. It further asserts that a court will not defer to an agency's subsequent interpretation of its policies where to do so "would intrude upon reasonable reliance interests." (Pet. at 24), citing *Heckler v. Community Health Serv.*, 467 U.S. 51 (1984); *NLRB v. Bell Aerospace Co.*, 416 U.S. 267 (1974); *Atchison, T. & S.F. R.R. v. Wichita Bd. of Trade*, 412 U.S. 800 (1973); *SEC v. Chenery Corp.*, 332

U.S. 194 (1947). In so doing, North Western has confused the actual principle espoused in those cases with what is claimed here to be a "retroactive interpretation."

The principle announced in *Heckler* is that an "administrative agency may not apply a new rule retroactively when to do so would unduly intrude upon reasonable reliance interests." 467 U.S. at 60, n.12. In the present case the 1978 Policy Statement was not issued to announce a rule, but only to provide a statement of "general principle" which would be subject to future adjustment. 43 Fed. Reg. at 10587 (p. A52). As such, there was no "rule" announced in the Policy Statement for North Western to rely on.

The cases of *NLRB v. Bell Aerospace Co.*, 416 U.S. 267 (1974), and *Atchison, T. & S.F. R.R. v. Wichita Bd. of Trade*, 412 U.S. 800 (1973), similarly do not support North Western's position. Those cases state that reliance on an agency's past decisions may entitle a party to act in accordance with those decisions. Here, there are no past decisions. The 1991 NPRM is the only decision ever released by the FRA on this issue.

Finally, the case of *SEC v. Chenery Corp.*, 332 U.S. 194 (1947), says nothing about reliance interests. In that case this Court expressly recognized the right of an administrative agency to issue a new rule or policy as part of an enforcement proceeding. This was true in *Chenery* even though it resulted in retroactive application to the respondent in that proceeding. 332 U.S. at 200-203. As this Court noted in *Chenery*, "every case of first impression has a retroactive effect." 332 U.S. at 203. *Chenery* clearly stands for the proposition that a party has no right to be free of agency enforcement in cases of first impression simply because the policy sought to be enforced has not previously been settled.

North Western makes a chimerical attempt to develop a "motive" for the FRA's issuance of the 1991 NPRM. North Western asserts that the reason the FRA denied that the OSHA fall protection regulations had been preempted by the 1978 Policy Statement was to deflect criticism from itself for failing to act sooner to develop its own fall protection regulations. (Pet. at 25). This is nothing more than pure speculation. Indeed, it was North Western itself that prompted the FRA's comments on this issue.

By letter dated July 18, 1990, North Western provided the FRA with portions of the brief it filed with the Illinois Appellate Court in this case.[7] In that letter North Western attempted to convince the FRA that the 1978 Policy Statement preempted application of OSHA fall protection regulations on railroad bridges. In the NPRM the FRA acknowledged that it had "recently received" a number of "legal memoranda" from various railroads regarding the meaning of that portion of the 1978 Policy Statement dealing with the walking-working surface regulations and, therefore, it wanted to clarify that issue. 56 Fed.Reg. at 3435 (p. A70). Having asked the FRA for clarification and the FRA having responded in a manner adverse to North Western's interests, North Western now attacks the FRA's motives in a pathetic attempt to discredit the 1991 NPRM.

The 1991 NPRM is consistent with the 1978 Policy Statement and, as such, should be given controlling weight.

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[7] A copy of this 18 page "letter-memorandum" is part of the record below.

IX. NOTHING IN THE ILLINOIS SUPREME COURT'S OPINION IS VIOLATIVE OF NORTH WESTERN'S RIGHT TO DUE PROCESS

As its final argument, North Western claims that it was denied due process. The basis for this claim is the Illinois Supreme Court's finding that the 1978 Policy Statement was ambiguous regarding whether or not OSHA's fall protection regulations were preempted. North Western claims that if the Policy Statement was ambiguous, then charging it with a violation of those regulations violates due process. North Western's allegations are completely without merit.

All that due process requires is a fair and reasonable warning of the conduct sought to regulated. *Faultless Division v. Secretary of Labor*, 674 F.2d 1177, 1185 (7th Cir. 1982). The only evidence presented below was that North Western had fair and reasonable warning of the conduct sought to be regulated because it knew that OSHA was applying its fall protection regulations to railroads. Following publication of the 1978 Policy Statement, but prior to the date of the accident in this case, the following events occurred:

(1) North Western was cited twice by OSHA for failing to provide fall protection for bridge workers;[8]

(2) OSHA published a decision in which it was reported that a Review Commission judge had decided that the 1978 Policy Statement did not

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[8] See letter dated February 12, 1981, from the "General Attorney" of the Chicago & North Western Transportation Co. to the Assistant vice-president for Accident and Loss Prevention for North Western. This letter is part of the record below, having been admitted in evidence to show North Western's notice of the danger. (RA at 18 and pp. 1112-14 of the trial transcript.).

> preempt OSHA fall protection regulations on railroad bridges.[9]

Those events clearly put North Western on notice that OSHA was enforcing its fall protection regulations on railroad bridges. Given this notice, it is inconceivable that North Western could claim that it was unaware of the conduct expected of it. *Corbesco, Inc. v. Dole*, 926 F.2d 422, 428 (5th Cir. 1991).

North Western has cited a number of cases in support of its contention that the ambiguity of the Policy Statement violated its due process rights. However none of those cases are germane to the issue here because in those cases the defendants had a right to rely on the particular statutes or regulations involved in those cases as setting forth the conduct required. In the instant case it was not reasonable for North Western to rely on the 1978 Policy Statement based upon its knowledge of OSHA's enforcement of the fall protection regulations.

Further, North Western did nothing between the issuance of the 1978 Policy Statement and the issuance of the 1991 NPRM in an attempt to get clarification from the FRA on what it now contends was an ambiguous Policy Statement. Instead North Western chose to rely on its own interpretation of the 1978 Policy Statement even though that statement contained the express provision that its discussion of OSHA jurisdiction should not be considered definitive. 43 Fed.Reg. at 10587 (p. A52). Given this disclaimer, at the very least, North Western had an obligation to inquire of the FRA whether OSHA had been

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[9] *Secretary of Labor v. Consolidated Rail Corp.*, 9 OSHC 1892 (1981). See footnote 6 and related text, *infra*, Section VI.

preempted as to fall protection. *Corbesco, Inc. v. Dole*, 926 F.2d 422, 428 (5th Cir. 1991); *Texas E. Prods. Pipeline Co. v. OSHA Review Comm'n*, 827 F.2d 46, 50 (7th Cir. 1987); *Fluor Constructors, Inc. v. OSHA Review Comm'n*, 861 F.2d 936, 942 (6th Cir. 1988).

Nor can North Western claim it based its conduct in this case in reliance on the court's decision in *Velasquez v. Southern Pacific Transp. Co.*, 734 F.2d 216 (5th Cir. 1984), since that decision was issued on June 14, 1984, almost six months after the accident in this case.

Consequently, since North Western had no right to rely on the Policy Statement, the admission of the OSHA fall protection regulations as evidence of negligence in this case in no way violated North Western's due process rights.

CONCLUSION

The Illinois Supreme Court's opinion is entirely consistent with all federal precedent and statements of legislative and administrative intent with regard to the scope of OSHA jurisdiction in the railroad industry. That opinion does nothing to change the established jurisdictional boundaries between OSHA and the FRA. Further, there is no important question of federal law which needs to be settled by this Court as the FRA has now adopted its own fall protection regulations which do preempt OSHA. Consequently, there is nothing in North Western's peti-

tion which warrants this Court's review. The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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RESPONDENT'S APPENDIX

UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH
REVIEW COMMISSION

SECRETARY OF LABOR, Complainant,	)	
v.	)	OSHRC DOCKET
	)	NO. 78-2119
CONSOLIDATED RAIL CORPORATION, Respondent.	)	

Appearances:

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DECISION AND ORDER

DITORE, J.:

PRELIMINARY STATEMENT

Respondent contested a citation for a serious violation of 29 CFR § 1926.28(a), a citation for a serious violation of 29 CFR § 1926.500(d)(1), or, in the alternative, Section 5(a)(1) of the Act, and the total penalty of $1,2600.00 [sic] proposed for the alleged violations.

Specifically Respondent was charged with the failure on March 29, 1978, to protect its employees by the use of safety belts and lines (29 CFR § 1926.28(a))[1] and standard railings (29 CFR § 1926.500(d)(1)[2] and Section 5(a)(1) of the Act),[3] from fall hazards of 34 or more feet at a workplace located at Passaic Avenue, Nutley, New Jersey.

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[1] The standards and the section of the Act cited are as follows:

"§ 1926.28 *Personal protective equipment.*

(a) The employer is responsible for requiring the wearing of appropriate personal protective equipment in all operations where there is an exposure to hazardous conditions or where this part indicates the need for using such equipment to reduce the hazards to the employees."

[2] § 1926.500(d)(1)

"(d) *Guarding of open-sided floors, platforms, and runways.* (1) Every open-sided floor or platform 6 feet or more above adjacent floor or ground level shall be guarded by a standard railing or the equivalent, as specified in paragraph (f)(1)(i) of this section, on all open sides, except where there is entrance to a ramp, stairway, or fixed ladder. The railing shall be provided with a standard toeboard wherever, beneath the open sides, persons can pass, or there is moving machinery, or there is equipment with which falling materials could create a hazard."

[3] *Section 5(a)(1) of the Act*

"Sec. 5.(a) Each employer—

(1) shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees;"

The action was heard at New York, New York on September 28, 1978.

ISSUES

1. Whether Respondent is exempt from the provision of the Occupational Safety and Health Act of 1970 pursuant to Section 4(b)(1) of the Act.

2. If Respondent is not exempt, whether the violations described in the citation and complaint existed at Respondent's workplace on March 29, 1978.

3. If the violations existed, whether any of Respondent's employees were exposed to the hazards created by the violations.

4. If employees were exposed, whether the hazards were serious and whether Respondent knew of the hazards.

5. If the hazards were serious and Respondent had knowledge of the hazards, whether Respondent is responsible for the violations.

6. If Respondent is responsible, whether the penalties proposed are proper and reasonable.

STATEMENT OF THE EVIDENCE

On or about March 28, 1978, a freight train derailment on a trestle bridge owned and operated by Respondent, damaged a number of railroad ties on the bridge (T. 9, 34, 102). The railroad trestle bridge was approximately 300 feet long and spanned Passaic Avenue in Nutley, New Jersey. The top of the bridge (track bed) was 34 feet, 8 inches above the highway (T. 28, 33, 103, 133-134; Exhs. G-8, G-17).

Respondent dispatched a work crew consisting of a carpentry gang of five men and a track gang of four to five men, to the location to repair and replace the damaged railroad ties (T. 84, 105, 109). The trestle bridge accommodated a single track and was as wide as the width of a freight car. During the time it took to make the necessary repairs, no railroad traffic moved over the bridge (T. 131).

On March 29, 1978, pursuant to a complaint, Compliance Officer Nicholas Nardiello of OSHA, inspected Respondent's worksite on the bridge (T. 23, 26, 27). Nardiello observed between ten and twelve of Respondent's employees removing damaged railroad ties from the track bed and carrying them off the bridge (T. 133). The railroad ties supported the track on the bridge. Each tie weighed about 125 pounds and required two to four men to remove it from the track bed and carry it off the bridge (T. 33, 36, 40, 103, 106; Exhs. G-9, G-18). Damaged ties were removed from the track bed in groups of four or five. As each damaged tie was removed, an open space was created on the track bed which increased in size, up to five feet, depending on the number of ties removed. From the openings to the ground below was a distance of 34 feet, 8 inches (T. 28, 31-32, 33, 35, 38, 138; Exhs. G-2, G-4, G-5, G-6, G-15). After the ties were removed from the track bed, they were carried off the bridge by Respondent's employees who walked along the east side edge of the bridge (T. 33, 35, 37, 38; Exhs. G-3, G-7, G-6, G-11, G-12, G-13, G-14, G-17).

Since the openings created by the removal of the damaged ties and the open sides of the bridge were unprotected, Officer Nardiello believed that Respondent's employees were exposed to fall hazards of approximately 34 feet (T. 28, 31-32, 34, 37, 38). None of Respondent's em-

ployees were wearing any safety protective equipment, i.e., safety belts and lines (T. 28). Nardiello believed Respondent's failure to protect its employees from the fall hazards created by the openings in the track bed was a violation of 29 CFR § 1926.28(a), and the failure to protect the employees from the unguarded open sides of the bridge was a violation of 29 CFR § 1926.500(d)(1) or of Section 5(a)(1) of the Act (T. 28, 38, 43, 45, 82).

On the second day after the inspection, Respondent removed its employees from the bridge and ceased all repair work until it obtained safety belts and lines which its employees were required to wear during the completion of the repair work (T. 55-56, 113, 114, 116).

Subsequent to the issuance of the citation and after a conference with Respondent's representatives, Complainant was convinced that the standard railing protection required by 29 CFR § 1926.500(d)(1), for the open sides of the bridge was not feasible. The only feasible method of abating the fall hazards created by the open sides of the bridge and the openings in the track bed was by a lifeline strung down the center of the track bed to which Respondent's employees could attach their safety belts and lanyards (T. 44, 46, 57, 114, 115). Respondent utilized this abatement method to complete its repair work on the bridge (T. 114, 115). The use of this method created no tripping or tangling problems or hazards for the employees in completing the repairs on the bridge (T. 115).

Officer Nardiello recommended an adjusted proposed penalty of $630.00 for each of the two serious violations with credits allowed only for size (T. 68, 69). Although there are several nonserious prior settlements, there is no prior history of record involving violations for the standards cited or any other serious violation (T. 6, 90).

Respondent does not dispute the facts as they relate to the repair work being done or to the hazards created. Respondent does claim that it is not the custom of the railroad industry to require the use of safety protective equipment when repairing railroad ties on a bridge; and that the use of safety lines and belts could create a tripping hazard for its employees doing such repair work (T. 105, 106-109, 110-111, 118-119, 135, 137, 138, 140).

Respondent also raises a Section 4(b)(1) affirmative defense and claims it is exempt from complying with the standards cited herein. Except for the introduction into evidence of a policy intent statement of the Federal Railroad Administration, this issue is confined to arguments made in the parties' post-trial briefs (T. 12-13, 19-22, 119-122; Exh. R-2, R-2A).

At the end of the entire case, the Section 5(a)(1) violation was separated from the citation (No. 1, item 2) and vacated on the ground Complainant failed to carry his burden on that issue (T. 158, 160). Respondent further moved to merge the 29 CFR § 1926.500(d)(1) violation into the 29 CFR § 1926.28(a) violation. Decision was reserved on this motion (T. 158).

OPINION

1. *Section 4(b)(1) Affirmative Defense*

Respondent raises an affirmative legal defense predicated on section 4(b)(1) of the Occupational Safety and Health Act of 1970 (the Act). No evidence was presented at the hearing by Respondent on this defense except for Exhibit R-2 (policy statement of FRA). The defense is argued and discussed in the post-hearing briefs of the parties. In its brief, Respondent contends that the Federal Railroad Administration (FRA) had exercised its statutory

authority to regulate the area of the safety of railroad operations which includes the work area where Respondent's employees were employed at the time of the alleged violations herein. This alleged exercise of statutory authority by FRA foreclosed the Occupational Safety and Health Administration from applying its safety standards to Respondent's workplace.

The basis for Respondent's position is a policy statement issued on March 14, 1978, by the FRA (42 Fed. Reg. 10583 *et seq.*, Exhibit R-2). The FRA issued the statement for two reasons: (1) as a notification by FRA of its withdrawal of its notice of proposed rulemaking with respect to railroad occupational safety and health standards, and (2) as an explanation in the form of a policy statement, of the respective jurisdictions of FRA and the Department of Labor as to railroad occupational safety and health (p. 10584, Exh. R-2).

In its policy statement FRA states that it "has decided to focus resources and energies for the immediate future on the safety of railroad operations"; that the safety of railroad operations "relates to the conditions and procedures necessary to achieve the safe movement of equipment over the rails" (p. 10585, Exh. R-2); and that it has exercised jurisdiction by actual rulemaking covering tracks, road beds, associated devices and structures, equipment, and human factors—the three component fields comprising the safety of railroad operations (p. 10586, Exh. R-2).

FRA further states in its policy statement that OSHA regulations which are connected with or relate to railroad operations and which may interact with or create operational hazards, might require consultation between FRA and OSHA concerning the interpretation or modification of such standards (p. 10587, Exh. R-2).

FRA continues with a general discussion, as a matter of general principle, of specific subparts of OSHA's occupational safety and health standards including the "Construction Standards" p. 10587, 10589, Exh. R-2). In the short paragraph dealing with OSHA's Construction Standards, FRA states:

> Section 1910.12 of OSHA's General Industry standards provides that the standards contained in 29 CFR Part 1926 relating to construction work are adopted as regulations under section 6 of the OSH Act and shall apply to every "employment" engaged in construction work. "Construction work" is broadly defined to include construction, alteration, and/or repair, including painting and decorating. To the extent that hazardous construction working conditions do not fall within FRA's exercise of authority relating to the safety of railroad operations, the OSHA standards apply according to their terms in the railroad industry. (p. 10589, Exh. R-2).

Although FRA's policy statement speaks of regulations presently existing as to the safety of railroad operations, neither the regulations nor the working conditions they cover are set forth. The general terms of the policy statement indicates that FRA's regulations whatever they may be, are concerned with the land worthiness of railroad rolling stock including tracks, road beds and other devices and appurtenances necessary for the safe operation of a railroad. There is neither evidence of any general or specific regulations nor any indication in the policy statement that FRA exercised authority over the hazardous working condition to which Respondent's employees were exposed. The evidence at the hearing established that while the repairs were being made on the railroad bridge, the bridge was closed to railroad traffic and not opened until the repairs were completed. The hazardous working condi-

tions in this case did not fall within any purported exercise of FRA's authority relating to the "safety of railroad operations" which would prevent OSHA's standards from applying. Further, Respondent neither called nor offered as a witness any responsible official of FRA to support its affirmative defense. Nor is there any evidence that Respondent alerted FRA to the instant action in order to allow FRA to intercede if it wished. The policy statement of FRA in and of itself, is too general and speculative to support Respondent's affirmative defense.

Respondent's reliance on *Usery v. Southern Pacific Transportation Co.*, 539 F.2d 386 (5th Cir., 1976) is misplaced. The Court in *Southern Pacific* at pp 391-392 after determining that section 4(b)(1) of the Act did not establish industry-wide exemptions, stated that

> "[s]ection 4(b)(1) means that any FRA exercise directed at a working condition—defined either in terms of a 'surrounding' or a 'hazard'—displaces OSHA coverage of that working condition."

In order to displace OSHA regulations, the FRA must articulate its regulations either to cover the "working condition" or articulate a formal position that a given working condition should go unregulated or that certain regulations—and no others should apply to a defined subject. See also *Baltimore & Ohio Railroad Company v. OSHRC*, 548 F.2d 1052 (D.C. Cir. 1976), *Southern Railway Company v. OSHRC*, 539 F.2d 335 (4th Cir., 1976), contra: *Secretary of Labor v. Baltimore and Ohio Chicago Terminal Railroad Company*, OSHRC Docket No. 77-1303 (unreviewed ALJ decision, 1978).

FRA's policy statement (Exh. R-2) is not a sufficiently concrete exercise of authority to displace OSHA coverage of the working condition here. Assuming, that FRA's

policy statement is an articulation of its jurisdiction over the safety of railroad operations, it fails to articulate whether the "working condition" hazard here is covered by its regulations or whether the condition should be unregulated. Respondent has failed to carry its burden of proof and its burden of persuasion on this issue.

2. *The Alleged Violations*

The evidence of record clearly establishes that on March 29, 1978, Respondent's employees, replacing damaged railroad ties on Respondent's bridge in Nutley, New Jersey, were exposed to falling hazards of 34 feet, and were not provided with, or required to use, personal protective equipment, i.e., safety belts and lines. The hazards were serious. An employee fall of 34 feet to the ground below could, more likely than not, have resulted in death or serious physical harm to the employee. Not only were the hazards obvious to the naked eye, but Respondent's supervisory employees knew of the hazards that existed. Respondent knew or with the exercise of reasonable diligence, could have known of the hazardous conditions.

a. *Citation No. 1, item 1 — 29 CFR § 1926.28(a)*

This standard places the responsibility upon an employer to require its employees to wear personal protective equipment when the employees are exposed to hazardous working conditions. The evidence not only established the exposure of Respondent's employees to falling hazards but established, and Complainant admitted, that the only way to feasibly protect the employees was by the use of safety belts and lines. At the time of the inspection, Respondent neither provided nor required its employees to wear safety belts and lines when performing railroad tie re-

placement work on the track bed of the bridge. After the inspection, Respondent's employees ceased their work and did not return to complete the work until the safety belt and line method was utilized. The use of the safety belts and lines by Respondent's employees during the completion of their work did not create any greater hazards nor make the work impossible to perform. Respondent is responsible for this violation. Under all the circumstances, including consideration of all the factors of Section 17(j) of the Act, and the cessation of work by Respondent until the hazardous condition could be abated, the proposed penalty of $630.00 is unreasonable. A penalty of $300.00 will be assessed.

b. *Citation 1, item 2 — 29 CFR § 1926.500(d)(1) or Section 5(a)(1) of the Act*

Complainant cited Respondent with a violation of 29 CFR § 1926.500(d)(1) and/or Section 5(a)(1) of the Act for the fall hazards to which Respondent's employees were exposed when walking at the unprotected open side of the bridge. The hazard involved was the same as in item 1 of the citation except that item 1 (29 CFR § 1926.28(a)) related to the openings in the track bed while item 2 related to open sides of the bridge. Both hazards were fall hazards of 34 feet from the bridge which could be feasibly protected against only by the use of safety belts and lifelines.

Since the one standard applicable to the conditions was 29 CFR § 1926.28(a), i.e., safety belts and lifelines, section 5(a)(1) of the Act and/or 29 CFR § 1926.500(d)(1) did not apply. Further, Complainant failed to carry its burden on the Section 5(a)(1) issue, and even if it did, the specific standard, 29 CFR § 1926.28(a), would take precedence

over, and would nullify the application of section 5(a)(1) of the Act. The alternate standard 29 CFR § 1926.500(d)(1) applies to open-sided floors and platforms. It strains credulity to consider a railroad bridge an open-sided floor or a platform as these terms are used in the context of the construction standards. Assuming that § 1926.500(d)(1) was applicable, it was established that compliance with the standard (guardrails or their equivalent) was not feasible. Item 2 of Citation No. 1 and the proposed penalty of $630.00 are vacated.

FINDINGS OF FACT

The credible evidence and the record as a whole establishes preponderant proof of the following specific findings of fact.

1. On March 28, 1978, a railroad derailment damaged railroad ties on a railroad bridge owned and operated by Respondent in Nutley, New Jersey.

2. On March 29, 1978, ten to twelve of Respondent's employees who were removing and replacing the damaged railroad ties, were exposed to fall hazards of 34 feet from the bridge to the ground below.

3. The fall hazards were created by unguarded openings in the track bed on the bridge, and by the unguarded open sides of the bridge.

4. In performing their work, Respondent's employees were neither provided with safety belts and lines, nor required to use such protective equipment.

5. The hazardous fall conditions were serious in that a 34-foot fall through an opening in the track bed, or off the open side of the bridge, by an employee could, more

likely than not, *result in serious physical harm or death* to the employee.

6. The hazardous conditions were clearly visible, and Respondent knew, or with the exercise of reasonable diligence, could have known of the hazardous conditions.

7. Complainant admits that the only feasible method to abate, and to protect the employees from, the fall hazards was by the utilization of safety belts and lines.

8. After the inspection of March 29, 1978, Respondent withdrew its employees from the worksite. When the employees returned to work they used safety belts and lines to complete their work.

9. From the time the repair work commenced to its completion, no railroad traffic used or was permitted to use the bridge.

10. The use of safety belts and lines by Respondent's employees neither created a greater work hazard, nor made their repair work impossible to perform.

11. Standard 29 CFR § 1926.28(a) is the only standard that is applicable to the working conditions herein.

12. Section 5(a)(1) of the Act and 29 CFR § 1926.500(d)(1) are not applicable standards.

13. The policy statement of the Federal Railroad Administration (42 Fed. Reg. 10583, *et seq.*; Exh. R-2) is not an exercise of statutory authority over the working conditions of Respondent's employees on March 29, 1978, and does not foreclose OSHA jurisdiction.

14. Respondent is responsible for the serious violation of 29 CFR § 1926.28(a).

CONCLUSIONS OF LAW

1. Respondent is, and at all times material herein was, engaged in a business affecting commerce within the meaning of section 3(5) of the Act (29 U.S.C. § 652(5)).

2. The Occupational Safety and Health Review Commission has jurisdiction over the subject matter and parties to this action.

3. OSHA jurisdiction is not foreclosed pursuant to Section 4(b)(1) of the Act, by any exercise of statutory authority of the Federal Railroad Administration over the working conditions herein.

4. On March 29, 1978, Respondent was in serious violation of 29 CFR § 1926.28(a) for its failure to protect its employees against fall hazards of 34 feet (Citation No. 1, item 1).

5. On March 29, 1978, Respondent was not in serious violation of 29 CFR § 1926.500(d)(1) and/or Section 5(a)(1) of the Act as these provisions did not apply to the working conditions herein (Citation No. 1, item 2).

6. The fall hazard alleged as the subject matter of Citation No. 1, item 2, is merged with the fall hazard subject matter of Citation No. 1, item 1.

7. Under the circumstances of this case with due consideration to the statutory factors of section 17(j) of the Act, the proposed penalty of $630.00 for the violation of 29 CFR § 1926.28(a), and the proposed penalty of $630.00 for the alleged violation of 29 CFR § 1926.28(a) and/or Section 5(a)(1) of the Act, are vacated. A single penalty of $300.00 is assessed for the merged violations of 29 CFR § 1926.28(a).

ORDER

Due deliberation having been had on the whole record, it is hereby

ORDERED that Citation (No. 1, item 1) for a serious violation of 29 CFR § 1926.28(a) is affirmed, it is further

ORDERED that Citation (No. 1, item 2) for a serious violation of 29 CFR § 1926.500(d)(1) and/or Section 5(a)(1) of the Act is vacated, it is further

ORDERED that the fall hazard subject matter of Citation No. 1, item 2 is merged with the fall hazard subject matter of Citation No. 1, item 1, it is further

ORDERED that the proposed penalty of $630.00 for the serious violation of 29 CFR § 1926.28(a), and the proposed penalty of $630 for the alleged violation of 29 CFR § 1926.500(d)(1) and/or Section 5(a)(1) of the Act, are vacated and a single penalty of $300.00 is assessed.

/s/ JEROME C. DITORE
JEROME C. DITORE
JUDGE, OSHRC

Dated: February 8, 1979
New York, New York

(Letterhead Of)

UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH
REVIEW COMMISSION
1825 K Street, N.W.
4th Floor
Washington, D.C. 20006-1246
Fax 8/ (202) 634-4008

CERTIFICATION

I, Ray H. Darling, Jr., certify that I am custodian of all official records in cases adjudicated before the Occupational Safety and Health Review Commission including the case of Secretary of Labor v. Consolidated Rail Corporation, OSHRC Docket No. 78-2119. I also certify that the attached decisions are true copies as contained in the Review Commission records in the above case.

In witness thereof, I have set my hand hereto this 28th day of September 1990.

ATTEST: /s/ RAY H. DARLING, JR.
Ray H. Darling, Jr.
Executive Secretary

(Letterhead Of)

UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH
REVIEW COMMISSION
1825 K Street, N.W.
4th Floor
Washington, D.C. 20006-1246
Fax 8/ (202) 634-4008

AUTHENTICATION

I, Edwin G. Foulke, Jr., Chairman of the United States Occupational Safety and Health Review Commission, do hereby certify that Ray H. Darling, Jr., Executive Secretary of the United States Occupational Safety and Health Review Commission, who signed the foregoing certification, was, at the time of the signing of same, duly commissioned and qualified to that office with full legal powers by the laws of the United States of America to make such certification; that said Ray H. Darling, Jr., had legal custody of the record so certified; and that I believe his signature to such certification is genuine.

In witness thereof, I have set my hand hereto this 28th day of September 1990.

ATTEST: /s/ EDWIN G. FOULKE, JR.
Edwin G. Foulke, Jr.
Chairman

RA18

LAW DEPARTMENT

CHICAGO, February 12, 1981

Mr. W. D. Selman
Assistant Vice President
Accident and Loss Prevention

Re: Employee Safety—Bridge Work

On January 22, 1981, Chicago and North Western Transportation Company was cited by OSHA for not providing safety equipment (i.e., life line, nets) or having adequate railing on Bridge #351 at Milepost 69.64 near Ottawa, Minnesota. This citation was triggered by the death of an employee who fell of [sic] this bridge on January 8, 1981. The Transportation Company has also been cited recently for not providing safety equipment or railings on a bridge near Boone, Iowa.

While it is our position that OSHA does not have jurisdiction over track structures or bridges, their citations point to an underlying problem; namely, employee safety while performing bridge work. I would request your investigation of this matter to determine if there is any effective safety equipment available for bridge work.

Anne E. Valle
General Attorney

ph

cc: Messrs. J. P. Daley
D. J. Owens
J. A. Barnes
M. C. Christensen
H. D. Hahn
R. W. Jones

Supreme Court, U.S.
FILED
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No. 92-1428

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

CHICAGO AND NORTH WESTERN TRANSPORTATION COMPANY,

Petitioner,

v.

TRACY TEMPLETON,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Illinois

PETITIONER'S REPLY BRIEF

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vs.

TRACY TEMPLETON,

Respondent.

On Petition For Writ of Certiorari to the Supreme Court of Illinois

PETITIONER'S REPLY BRIEF

INTRODUCTION

Perhaps the most important issue raised by North Western's petition is whether settled federal regulatory law may be retroactively "interpreted," and the revised law enforced without regard for constitutional and statutory mandates or the plain language of the regulation itself. Ironically, plaintiff's brief attempts to avoid the issue by transparently rewriting federal precedent and the history of this very litigation.

Plaintiff's inability to candidly face the issues raised by North Western's petition underscores the need for plenary review of the action below. Indeed, an analysis of plaintiff's brief suggests that summary reversal may be appropriate.

ARGUMENT

I.
THE FRA'S 1978 POLICY STATEMENT DID NOT PROVIDE REASONABLY CLEAR NOTICE OF A NEED FOR COMPLIANCE WITH THE OSHA REGULATIONS AT THE TIME OF PLAINTIFF'S ACCIDENT

The majority of the divided Supreme Court of Illinois was persuaded by plaintiff to find that the 1978 FRA Policy Statement's declarations of regulatory jurisdiction over railroad bridges was subject to two competing interpretations "which are equally reasonable." (p. A9).[1/] The court was also persuaded by plaintiff to resolve the perceived ambiguity against North Western, because the FRA's 1991 interpretation of the 1978 Policy Statement was not "plainly erroneous." (p. A7-9).

The lower court could not be persuaded by North Western to even consider the constitutional issues raised by its retroactive ruling. (Pet. at 13).[2/] Yet, this Court has emphasized that a regulation which is so vague "that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law." *Connally v. General Const. Co.*, 269 U.S. 385, 391 (1926); *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 665 (1985).

The state high court's refusal to address the fundamental issues of due process raised by its retroactive ruling presents

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[1/] Page numbers in parenthesis preceded by "A" refer to the Appendix to the Petition; those preceded by "RA" refer to Respondent's Appendix.

[2/] References to the Petition for Certiorari are noted as "(Pet. at ___);" references to Respondent's Brief In Opposition are noted as "(Br. at ___)."

plaintiff with a substantial dilemma. The state high court, itself, found that one *could reasonably understand* the 1978 Policy Statement to vest exclusive jurisdiction over railroad bridges in the FRA. (p. A9). Indeed, the court's dissenting justices believed that such was the *only* rational interpretation which the Policy Statement permitted (pp. A13-17), as did the Appellate Court of Illinois (pp. A28-29), and the federal courts which had previously interpreted the Policy Statement.[3/]

The only solution plaintiff can devise to defend the lower court's arbitrary action is to radically revise the parties' roles below. Plaintiff deliberately mischaracterizes North Western as the *proponent* of ambiguity in the Policy Statement. The role reveral not only permits plaintiff to argue that the retroactive "interpretation" of the Policy Statement could not have intruded upon North Western's reasonable reliance interests; but, it even permits plaintiff to condemn North Western for "doing nothing to get a clarification from the FRA" between 1978 and 1991. (Br. at 24-25, 28).

However, plaintiff's revision of the record will not stand the slightest scrutiny. North Western never understood the Policy Statement to be a declaration of dual FRA/OSHA jurisdiction over railroad bridge safety. Plaintiff's own appendix attaches an internal North Western memo, dated February 12, 1981, which confirms that fact. Therein, North Western's General Attorney urges a company study of bridge safety improvements, while

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[3/] *Velasquez v. Southern Pacific Co.* , 734 F.2d 216 (5th Cir. 1984); *Norfolk & W. Ry. v. Public Utilities Comm'n of Ohio*, 727 F.Supp. 367, *aff'd*, 926 F.2d 567 (6th Cir. 1991). *See also, Norfolk & W. Ry. v. Burns*, 587 F.Supp. 161 (S.D. Mich. 1984); *Secretary of Labor v. Consolidated Rail Corp.*, 10 OSHC 1577 (1982); 45 U.S.C. §431(n) (1988).

nonetheless affirming that the company will resist OSHA citations regarding bridge safety equipment and railings because "*it is our position that OSHA does not have jurisdiction over track structures or bridges...*" (p. RA18).

Plaintiff's appendix contains an equally telling omission. Plaintiff asserts that North Western "asked the FRA for *clarification*" of its 1978 Policy Statement by letter dated July 18, 1990. (Br. at 26). Furthermore, according to plaintiff, the letter "provided the FRA with portions of the brief it filed with the Illinois Appellate Court in this case." (Br. at 26). Curiously, plaintiff fails to include the allegedly damning letter in his appendix. The omission was not an oversight.

The July 18, 1990 letter is here included as Petitioner's Supplemental Appendix. The letter does not petition for "clarification" of the FRA's 1978 Policy Statement; nor does it attach portions of North Western's appellate brief. Instead, the letter reiterates North Western's understanding that the FRA has exclusive jurisdiction over railroad bridge safety and it urges the FRA not to cede its existing jurisdiction to OSHA for sound reasons of public policy. (p. SA1).

Plaintiff's brief not only grossly misrepresents the letter's contents, but the occasion for its filing. The Rail Safety Improvement Act of 1988 directed that the FRA consider issuing such regulations "as may be necessary" for the safety of railroad bridge workers. 45 U.S.C. §431(n) (1988). In considering the issuance of such regulations, the FRA solicited public comment from the entire railroad industry concerning how the FRA might best proceed. 56 Fed.Reg. at 3435 (p. A70).

North Western responded based upon its understanding that the FRA had exclusive jurisdiction over railroad bridges.

(p. SA1). Indeed, as the FRA indicated in its 1991 Notice, "*all*" of the FRA's respondents filed submissions evidencing the same alleged "confusion." 56 Fed.Reg. at 3435 (p. A70). The dubious distinction between the regulation of bridge surfaces and the regulation of potential falls from those surfaces, which the FRA raised for the first time in 1991, had previously eluded *everyone*: the regulated community, railroad employees, the FRA's own safety inspectors and the federal courts. 56 Fed.Reg. at 3435 (p. A70).[4/]

II.
THE OPINION OF THE SUPREME COURT OF ILLINOIS IGNORES FEDERAL PRECEDENT AND FUNDAMENTAL CONSIDERATIONS OF DUE PROCESS

Previously, plaintiff successfully urged the state high court not to "slavishly follow" federal decisional law in this case and act independently. (Pet. at 10-11). Conversely, he now defends the court's opinion by contending that it is "entirely consistent with all federal precedent." (Br. at 1, 29). Plaintiff's brief, however, cannot cite any federal precedent which would lend credence to plaintiff's claim that such a remarkable metamorphosis was achieved.

For example, Plaintiff asserts that the lower court was correct in finding that the FRA's declaration of exclusive jurisdiction over "railroad operations" could reasonably be read to limit FRA jurisdiction to "the movement of equipment over rails." (Br. at 11, 14). In *Velasquez v. Southern Pacific Transp.*

[4/] As shown by North Western's petition, one could also expand the list of the "confused" to include the former FRA Administrator, John M. Sullivan, as well as the FRA's Office of Chief Counsel (Pet. at 19-20).

Co., 734 F.2d 216 (5th Cir. 1984), however, the Fifth Circuit flatly rejected such an assertion:

> Velasquez points to the FRA's definition of railroad operations as the 'movement of equipment over rails,' 43 Fed.Reg. at 10585, and argues that this language limits displacement of OSHA to activities actually involving such movement. We disagree. Although the FRA displacement involves safety concerns relating to movement over the rails, the policy statement is clear: OSHA does not apply to the physical structures described in the statement; displacement is not limited to the *activity* of moving equipment over the rails. (Emphasis in the original.)

Velasquez, 734 F.2d at 218. *Accord: Secretary of Labor v. Consolidated Rail Corp.*, 10 OSHC 1577, 1580-81 (1982) (Holding that OSHA regulations would not apply to working conditions involving those railroad structures and facilities enumerated at 43 Fed.Reg. 10587 (pp. A53-54)).

Nor does plaintiff treat *Norfolk & W. Ry. v. Public Utilities Comm'n of Ohio*, 727 F.Supp. 367, *aff'd.*, 926 F.2d 567 (6th Cir. 1991) with any degree of candor. Plaintiff claims that *Norfolk & W. Ry.* "did not discuss working conditions on bridges." (Br. at 16). That is untrue.

At issue in *Norfolk & W. Ry.* was a state railroad commission order which sought to address safe working conditions on railroad bridges by requiring handrails and walkways to lessen the chance of falling. The federal court, however, reasoned that such regulations were preempted by the FRA's 1978 Policy Statement *precisely because* the Statement so clearly declared that railroad bridges should be within FRA's sole

jurisdiction. *Norfolk & W. Ry.* at 370. Moreover, the federal court concluded that Congress had only reinforced that preemption by confirming through 45 U.S.C. §431(n) (1988) that the FRA should have exclusive jurisdiction "*in the area of bridge safety equipment.*" *Norfolk & W. Ry.*, at 370-71 (Emphasis added).

Plaintiff also contends that the lower court was correct in reasoning that the FRA's exclusive exercise of authority over track and associated structures, including bridges, could reasonably be restricted to "geometric and other technical standards" related to bridges' dimensions and structural integrity. (Br. at 14) Not only is such a conclusion in direct conflict with *Norfolk & W. Ry.*, but it is contrary to specific FRA regulations pertaining to employee fall protection. As the federal court observed in *Norfolk & W. Ry.* at 370, the FRA assumed continuing jurisdiction over employee fall protection on railroad bridges as early as 1976. See, 41 Fed.Reg. 50302 (1976) (p. A60); 42 Fed.Reg. 22184 (1977) (p. A62); 43 Fed.Reg. at 10586 (1978) (p. A49); and 57 Fed.Reg. 28116 (1992).

Secretary of Labor v. Consolidated Rail Corp., OSHRC Docket No. 78-21119, *aff'd*, 9 OSHC 1892 (1981) is the only "federal authority" which even remotely supports the lower court. (Br. at 17). In that unpublished opinion, an OSHA administrative law judge was not persuaded that the 1978 Policy Statement served to oust OSHA from jurisdiction over railroad bridges (pp. RA6-10). He refused to consider the Policy Statement to be preemptive due to a failure of proof, particularly the absence of evidence from "any responsible official of FRA." (p. RA9).

Plaintiff's brief emphasizes that the OSHA Review Commission affirmed the administrative law judge, but obscures

the fact that the Review Commission soon reversed itself in *Secretary of Labor v. Consolidated Rail Corp.*, 10 OSHC 1577 (1982). Therein, the railroad defendant *did* offer proof of the FRA's preemptive intent through the letter affidavit of the then FRA Administrator, John M. Sullivan. *Consolidated Rail Corp.* at 1579, n. 8. The OSHA Review Commission's subsequent reversal of its earlier opinion was explicit and complete:

> ...(T)he FRA Policy Statement is an exercise of the FRA's statutory authority that gives rise to an exemption under Section 4(b)(1) of the OSH Act. Accordingly, we overrule Conrail I to the extent that it is inconsistent with our decision in this case.

Consolidated Rail Corp. at 1579.

Plaintiff's citation to *Southern Pacific Transp. Co. v. Public Utilities Comm'n of California*, 647 F.Supp. 1220, *aff'd. per curiam*, 820 F.2d 1111 (9th Cir. 1987) is also unavailing. (Br. at 9). That litigation addressed state regulatory authority over the railroad industry, not the FRA/OSHA dichotomy. The court simply found that the 1978 Policy Statement did not preclude states from regulating railroad safety under those limited circumstances specified in the Federal Railroad Safety Act, itself. *Southern Pacific Transp. Co.* at 1223.[5/]

Ultimately, plaintiff can only justify the lower court by contending that a federal agency's retrospective statement of intent necessarily trumps preexisting federal decisional law, as

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[5/] Plaintiff omits the only aspect of the case which is material. That litigation marked still another instance wherein the FRA submitted letter affidavits asserting its exclusive jurisdiction over the railroads' operating environment. *Southern Pacific Transp. Co.* at 1226-27.

well as contrary statutory and constitutional mandates. "After all", according to plaintiff, "it is only the agency's intent, not the court's, which controls the scope of preemption." (Br. at 16).

Such an unreasoned deference to federal agencies should not become a part of the fabric of federal law. Previously, agency interpretations have always been measured against a court's best reading of Congress' own overriding intent, the plain language of the regulation itself, and the greater constitutional framework of federal law. *Consumer Product Saf. Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 117-120 (1980). *Accord: Gardebring v. Jenkins*, 485 U.S. 415, 430 (1988); *Udall v. Tallman*, 380 U.S. 1, 17-18 (1965); *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945).

The retrospective agency interpretation here at issue comes thirteen years after the publication of the Policy Statement it purports to interpret and, by the agency's own admission, constitutes an interpretation which had previously eluded everyone in the regulated community, its own inspectors and the federal courts. 56 Fed.Reg. at 3435 (p. A70). Thus, this very case illustrates the arbitrary results which will occur if agency determinations are placed beyond judicial scrutiny.

As emphasized by the Amicus Brief filed by the Association of American Railroads, the potential effect of the lower court's analysis of federal law will not "be felt in this case alone." (Br. at 2). The FRA claimed exclusive jurisdiction over "railroad operations" in the 1978 Policy Statement. 43 Fed.Reg. 10586 (p. A47-48). If as the lower court concluded, the FRA failed to adequately define that phrase, then neither the nation's railroads nor federal and state regulators may now be reasonably certain of the sweep of the FRA's exclusive jurisdiction. (Amicus Br. at 9-

13). Plaintiff may now magnanimously concede the FRA's exclusive jurisdiction over railroad bridge safety (Br. at 2); but, if the lower court's opinion is correct, all else is confusion and subject to resolution only by *ad hoc* civil litigation. The end result will be a proliferation of overlapping, piecemeal attempts to apply federal and state OSHA regulations throughout the railroad industry - the very antithesis of stated Congressional policy. This Court should act now to prevent such a result.

CONCLUSION

For the foregoing reasons, the writ of certiorari should be granted.

Respectfully submitted,

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PETITIONER'S SUPPLEMENTAL APPENDIX

CHICAGO AND NORTH WESTERN TRANSPORTATION COMPANY

James P. Daley
Senior Vice President
General Counsel and Secretary

July 18, 1990

Mr. Mark Linsey
Chief Counsel
Federal Railroad Administration
U.S. Department of Transportation
400 Seventh Street, S.W., Room 4218
Washington, D.C. 20590

RE: FRA Jurisdiction Over Working
Conditions On Railroad Bridges

Dear Mr. Linsey,

Through membership in the Association of American Railroads, I recently became aware that both the Secretary of Transportation, Samuel K. Skinner, and FRA Administrator, Gilbert E. Carmichael, have expressed reservations about promulgating rules or regulations concerning safe working conditions on railroad bridges. I was further advised that the Secretary and the FRA are considering the possibility of ceding FRA jurisdiction over the subject to OSHA.

We at the Chicago and North Western Transportation Company sincerely hope that the AAR has misinterpreted the situation and that no such proposal is under consideration. As you are aware, the Federal Railroad Safety Act (FRSA) calls for

nationally uniform safety regulations and uniform enforcement. The Act explicitly authorizes the Secretary of Transportation to prescribe appropriate regulations "for all areas of railroad safety." 45 U.S.C. §432 (1970). Furthermore, there is a specific federal statute on point -- 45 U.S.C. §431(n) -- which charges the Secretary of Transportation (not the Secretary of Labor) with the responsibility of issuing "such rules, regulations, orders and standards as may be necessary for the safety of maintenance of way employees...."

Moreover, railroad management and labor have previously joined together to submit proposed standards for safe working conditions which were intended to assist the FRA in responding to its Congressional mandate. Thus, CNW finds it difficult to credit the possibility that FRA is even considering ceding its jurisdiction to OSHA.

Nonetheless, given the remote possibility that the Secretary of Transportation may even be contemplating such a course of action, CNW is obliged to register a most emphatic protest. As the attached citations indicate, OSHA does not have jurisdiction over working conditions on railroad bridges. Likewise, ceding jurisdiction over the subject to OSHA would constitute very poor public policy which would fragment railroad regulation in derogation of the express intent of Congress.

It is the FRA, not OSHA, which has the authority and expertise necessary to effectively regulate the safety of working conditions on railroad bridges. As the following legal authorities establish, ceding such authority to OSHA would not only be without legal foundation, but it would be detrimental to the railroad industry. Such a development would shatter the Congressional policy mandating uniformity of railroad regulation and promote the Balkanization of railroad regulation in an important area of employee safety.

I.
The FRA Has Exclusive Jurisdiction Over Working Conditions On Railroad Bridges

In 1970 Congress enacted the Federal Railroad Safety Act (FRSA), 45 U.S.C. §421, et.seq. As the Seventh Circuit Court of Appeals has observed, "(T)he purpose of the Act was to provide comprehensive and uniform safety regulations in all areas of railroad operations." Chicago Transit Authority v. Flohr, 570 F.2d 1305, 1308 (7th Cir. 1977). This was clearly the Congressional intent because the Act explicitly authorized the Secretary of Transportation to adopt railroad regulations "to promote safety in all areas of railroad operations." 45 U.S.C. 421 (emphasis added). Furthermore, the FRSA explicitly stated that "the Secretary of Transportation [or his agents]...shall (1) prescribe as necessary appropriate rules, regulations, orders and standards for all areas of railroad safety...." 45 U.S.C. §432 (emphasis added).

In 45 U.S.C. §434, Congress further declared its intention that laws, rules, regulations, orders and standards relating to railroad safety should be uniform and consistent. Indeed, the legislative history of the FRSA evidences a clear Congressional intent that rail safety regulations be nationally uniform:

> "With the exception of industrial or plant railroads, the railroad industry has very few local characteristics. Rather, in terms of its operations, it has a truly interstate character calling for a uniform body of regulations and enforcement. It is a national system..."

H.R.Rep. No. 1194, 91st Cong., 2d Sess., reprinted in 1970 U.S. Code Cong. & Admin. News 4104, 4109-4111.

Given this clear Congressional mandate, the preemptive effect of the FRSA had been broadly construed by the federal courts. For example, in commenting on the FRSA, the Third Circuit Court of Appeals said, "We believe these statutory provisions evince, as the district court determined, a 'total

preemptive intent.'" National Ass'n of Regulatory Utility Com'rs. v. Coleman, 542 F.2d 11, 13 (3rd Cir. 1976). Similarly, the Fifth Circuit has noted, "The meaning of the Congressional declaration is clear. The ultimate goal of the Act is to establish national uniform control of railroad safety...." Donelon v. New Orleans Terminal Co., 474 F.2d 1108, 1112 (5th Cir. 1973).

The federal courts have not been unmindful that the Occupational Safety and Health Act of 1970 (OSH Act), 29 U.S.C. §§651-678, also addresses occupational safety, but they have recognized that the OSH Act addresses working conditions in a broader industrial environment, and that the OSH Act is inapplicable whenever the FRA has primary jurisdiction over the railroad working conditions at issue. Velasquez v. Southern Pacific Transp. Co., 734 F.2d 216 (5th Cir. 1984); Southern Pacific Transp. Co. v. Usery, 539 F.2d 386, 391 (5th Cir. 1976), cert. denied, 434 U.S. 874 (1977); Southern Ry. v. Occupational Saf. & H. Rev. Comm., 539 F.2d 335, 339 (4th Cir. 1976). Also see, Atchison T. & S. F. Ry. v. Illinois Commerce Comm'n, 453 F.Supp. 920 (N.D. Ill. 1977) applying the same logic to preempt state safety legislation affecting the railroad industry.

Indeed, deference to the FRA's primary jurisdiction over occupational health and safety issues pertaining to the railroad industry is reflected in Section 4(b)(1) of the OSH Act itself, which cedes jurisdiction over employee "working conditions" to other federal agencies which have more specific Congressional authority to enforce standards or regulate working conditions affecting specific occupations:

> Nothing in this chapter shall apply to working conditions of employees with respect to which other Federal agencies...exercise statutory authority to prescribe or enforce standards or regulations affecting occupational safety or health. (Emphasis added.)
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> 29 U.S.C. §653(b)(1)

Correspondingly, the FRA has consistently declared its exclusive jurisdiction over working conditions pertaining to railroad bridges based upon its special expertise and knowledge concerning the railroad industry. For example, in November, 1976, the FRA addressed the issue of whether walkways should be required as an employee safety measure on all railroad bridges. 41 Fed.Reg. 50 (1976). This FRA rulemaking was terminated in April, 1977 when the FRA concluded that such a mandate could not be justified because it would impose significant added financial burdens on the railroad industry. The FRA determined that diverting railroad resources from other maintenance and improvement projects would not serve the overall interests of employee safety. 42 Fed.Reg. 22185 (1977).

A year later the FRA reiterated its exclusive jurisdiction over railroad bridges by again publishing similar conclusions regarding bridge walkways:

> FRA has affirmatively determined that issuance of Federal regulations governing walkways on bridges is not warranted based on the projected cost of installation and the collateral safety problems which would be created.
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> 43 Fed.Reg. 10586 (1978)

Additionally, on March 14, 1978, the FRA issued a sweeping policy statement describing the amount of authority it was willing to cede to OSHA. The FRA policy statement included the following declarations which are pertinent to the present controversy:

> "Within the area of railroad operations, it is FRA which must decide what regulations are necessary and feasible ...FRA has now exercised its statutory authority...While it is expected that additional regulatory initiative may be undertaken as necessary,...it is the judgment of the agency that piecemeal regulation of individual hazards... by any other agency of government would be disruptive and contrary to the public interest. Should it be

> demonstrated that further specific regulatory actions is required...FRA will not hesitate to employ its emergency powers or to initiate special-purpose proceedings directed to the solution of individual problems. Therefore, as the primary regulatory agency, FRA has exercised and continues to exercise its jurisdiction over the safety of railroad operations." (Emphasis added.)
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> 43 Fed.Reg. 10586 (1978)

Specifically, the FRA went on to declare that OSHA regulations would be allowed to have some application to railroad offices and shops that had the character of a general or industrial setting, but no more. The FRA retained exclusive jurisdiction over the railroads' field operations and all matters pertaining to "(1) track, roadbed and associated devices and structures, (2) equipment and (3) human factors." Vol. 43, Fed.Reg. 10585. In regard to those areas, the FRA declared that "(I)n these traditional areas of railroad safety, FRA has developed a special expertise which makes this agency uniquely qualified to play the primary role in the Federal Government's role to assure safe employment...in activities related to railroad operations." Vol. 43, Fed.Reg. 10585.

The FRA declared its exclusive jurisdiction over the railroads' field operations, and specifically declared that "OSHA regulations...would not apply to...railroad bridges":

> "OSHA regulations concerning working surfaces deal with such matters as ladders, stairways, platforms, scaffolds and floor openings. Generally, these regulations are applicable in railroad offices, shops, and other fixed work places. There are three principal exceptions to the rule. First, they would not apply with respect to the design of locomotives and other rolling equipment used on a railroad, since working conditions related to such surfaces are regulated by FRA as major aspects of railroad operations.

> Second, as the agency which has exercised jurisdiction over railroad operations, FRA is responsible for the safe movement of rolling stock through railroad repair shops. OSHA requirements for general industry are in some respects inconsistent with the optimum safety of employees in this unique environment where hazards from moving equipment predominate. Therefore, OSHA regulations on guarding of open pits, ditches, etc., would not apply to inspection pits in locomotive or car repair facilities. FRA is better equipped to assess proper clearance technology and employee knowledge of existing industry practices as well as the prevalence and severity of hazards represented by specific injury occurrence codes in accident/incident reporting statistics. FRA is responsible for determining what additional regulatory steps, if any, may be necessary in this area in light of overall safety considerations.
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> Third, the OSHA regulations would not apply to ladders, platforms, and other surfaces on signal masts, cantenary systems, railroad bridges, turntables, and similar structures or to walkways beside the tracks in yards or along the right-of-way. These are areas which are so much a part of the operating environment that they must be regulated by the agency with primary responsibility for railroad safety." (Emphasis added.)
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> 43 Fed.Reg. 10587 (1978)

Thus, the FRA declared "OSHA regulations" inapplicable to those areas within FRA's special expertise, including railroad bridges. In fact, even OSHA's own Review Commission, which is charged with the final administrative adjudication of the OSHA Act, under 29 U.S.C. §659, has recognized that "there is no doubt that the FRA has the statutory authority to regulate the safety of employees in the railroad industry." Secretary of Labor v. Consolidated Rail Corp., 10 OSHC 1577, 1579-81 (1982). Moreover, in the same proceeding the OSHA Review

Commission conceded that FRA's declarations of jurisdiction in March of 1978 ousted OSHA from jurisdiction over all aspects of the railroad industry other than limited jurisdiction over railroad shops and offices that typified a more traditional industrial setting. Secretary of Labor v. Consolidated Rail Corp., 10 OSHC at 1579-81.

Finally, the federal courts have likewise held that OSHA jurisdiction over working conditions on railroad bridges has specifically been preempted by the FRA's declaration of March, 1978. Velasquez v. Southern Pacific Co., 734 F.2d 216 (5th Cir. 1984); Norfolk & W. Ry. v. Public Utilities Comm'n of Ohio, 727 F.Supp. 367 (S.D. Ohio 1990).

Very recently, in Norfolk & W. Ry., supra, the Federal District Court reiterated that the FRA declaration of 1978 clearly displaced OSHA regulations and rendered them inapplicable to railroad bridges:

> "Finally, in 1978, the FRA issued a statement indicating which aspects of the railroad industry fall under its exclusive jurisdiction thereby displacing applicable OSHA regulations: 'OSHA regulations would not apply to...railroad bridges....These are areas which are so much a part of the operating environment that they must be regulated by the agency with primary responsibility for railroad safety.'" (Citing 43 Fed.Reg. 10587 (1978)) (Emphasis added.)

Norfolk & W. Ry., 727 F.Supp. at 370.

Apparently, FRA Administrator Carmichael has been advised by his staff that working conditions involving personal protective equipment could be severed from all other aspects of bridge construction and FRA jurisdiction over same thereby ceded to OSHA. The Norfolk & W. Ry. case also squarely disposes of such a contention.

The Norfolk & W. Ry. court noted that the 1988 amendment to the FRSA specifically reconfirmed FRA's exclusive jurisdiction over working conditions involving railroad bridges, including personal protective equipment. The statute clearly underscores Congress' conviction that the FRA is best qualified to determine what, if any, federal regulation might be required to further the interest of employee safety when working on railroad bridges. Norfolk & W. Ry., 727 F.Supp. at 370-71.

Indeed, the 1988 amendment to FRSA specifically states that "standards for bridge safety equipment" are for the sole discretion of the Secretary of Transportation and the Federal Railroad Administration:

> The Secretary shall within one year after June 22, 1988, issue such rules, regulations, orders and standards as may be necessary for the safety of maintenance of way employees, including standards for bridge safety equipment, such as nets, walkways, handrails, and safety lines, and requirements relating to instances when boats shall be used.
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> 45 U.S.C. §431(n)

Thus, the 1988 amendment to the FRSA only further confirms that OSHA has no authority to regulate employee working conditions on railroad bridges and that it is solely the responsibility of the FRA to "issue such rules, regulations, orders and standards as may be necessary" for the safety of employees engaged in bridge work. Norfolk & W. Ry., 727 F.Supp. at 371.

Certainly the Federal Court of Appeals sitting in Velasquez v. Southern Pacific Co., 734 F.2d 216 (5th Cir. 1984), believed that it was compelled to reach such a conclusion. In that case, a jury returned an FELA verdict against a railroad as a result of an employee's fall from a bridge and a claimed violation of OSHA regulations. On appeal, however, the Fifth Circuit found, as a matter of federal law, that the OSHA regulations did not apply to working conditions on railroad bridges and walkways because the

FRA declaration of March, 1978, has clearly displaced OSHA from any jurisdiction:

> The FRSA has issued a statement indicating which aspects of the railroad industry fall under the exclusive jurisdiction of the FRA, thereby displacing applicable OSHA regulations. That statement provides:
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> > "OSHA regulations would not apply to ladders, platforms,...railroad bridges, turntables, and similar structures or to walkways beside the tracks...These are areas which are so much a part of the operating environment that they must be regulated by the agency with primary responsibility for railroad safety."
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> 43 Fed.Reg. 10583-10590 (1978) (emphasis added by the court).
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> The accident in the present case occurred on a walkway beside a track in a yard, and on a railroad bridge. The FRA policy statement provides that such areas are not subject to OSHA regulations. It is not necessary that the FRA implement specific regulations for these areas; an assertion of authority in a policy statement is sufficient to displace OSHA regulations. [citations] (Emphasis added)

Velasquez, 734 F.2d at 218.

Therefore, when one considers FRA's preemptive declaration of March, 1978 and OSHA's deferential response thereto in Secretary of Labor v. Consolidated Rail Corp., 10 OSHC 1577 (1982), as well as the binding federal judicial precedent cited herein, it is not surprising that Congress declared in 45 U.S.C. 431(n) (1988) that FRA shall "issue such rules, regulations, orders and standards as may be necessary for the safety of maintenance-of-way employees...." In passing the FRSA,

Congress had clearly always intended that the Secretary of Transportation should exercise exclusive authority to prescribe rules and regulations for all areas of railroad safety and the mandate found in §431(n) is only further evidence of this consistent Congressional intent. Thus, as a matter of law, clearly FRA cannot avoid the specific mandate of 45 U.S.C. §431(n) by referencing OSHA regulations which are inapplicable to the railroad industry.

II.
As A Matter Of Sound Public Policy FRA Should Prescribe Those Rules and Regulations Applicable To Working Conditions On Railroad Bridges

Public Policy reasons for exclusive FRA jurisdiction are readily found in the applicable federal legislation, as well as in the public pronouncements of the FRA, itself. I have also discussed these matters with C&NW's Vice President - Engineering, R. H. McDonald, and we would offer the following reasons why the FRA should not cede jurisdiction to OSHA:

1. First, and foremost, the FRA should exercise the authority specifically delegated solely to it by 45 U.S.C. §431(n) because the law so provides. The Secretary of Transportation or his agents are charged by Section 431(n) with considering the necessity of bridge safety equipment and with issuing appropriate rules and regulations. Deferring to pre-published OSHA regulations which apply to American industry as a whole would not comply with the specific Congressional mandate. FRA has not held hearings on OSHA's industrial regulations involving safely belts and nets (1926.103, 1926.104, 1926.105 and 1926.106) to determine if they would be suitable for application to working conditions on railroad bridges nor has FRA provided railroad management or labor with an opportunity to comment on same. Thus, a blanket deferral to OSHA would not be consistent with the Congressional mandate. Indeed, should FRA choose to ignore its clear Congressional mandate on the grounds of

expediency it will only delay final resolution of these important matters by formenting future litigation. Such uncertainty could hardly be said to be consistent with the best interests of employee safety.

Furthermore, 45 U.S.C. §431(n) specifically charges FRA with the obligation to reconsider its earlier pronouncements on bridge walkways. Deferring to OSHA regulations 1926.103-1926.106 would not satisfy this specific Congressional mandate, because railroad bridge walkways are not discussed there and FRA has previously declared walkways to be within its sole jurisdiction. See, 42 Fed.Reg. 22185 (1977); 43 Fed.Reg. 10586 (1978).

2. FRA deference to OSHA's general industrial regulations is the exact opposite of what Congress clearly intended in passing FRSA and in empowering the Secretary of Transportation to prescribe safety rules "for all areas of railroad safety." 45 U.S.C. §432. Congress clearly intended that OSHA should defer to FRA's expertise and not the opposite. Likewise, Congress clearly intended that the ultimate goal of the Act is to establish rational, uniform, control over railroad safety. That goal will not be realized so long as railroad field operations are regulated by both OSHA and FRA. Thus, for the FRA to actually promote such a result would truly be a dramatic step backward.

3. Any ill-conceived "deference" to OSHA on the subject of bridge working conditions would not only expand the application of OSHA's inappropriate industrial regulations to the railroad industry, but it would also create the opportunity for further fragmentation of railroad regulation, precisely the result Congress was attempting to avoid in passing the FRSA.

FRA's declarations of jurisdiction are exclusive and preemptive and have the effect of ousting both OSHA and state legislation from application. Norfolk & W. Ry. v. Public Utilities Comm'n. of Ohio, 727 F.Supp. 367 (S.D. Ohio 1990);

Atchison, T. & S.F. Ry. v. Illinois Commerce Comm'n., 453 Supp. 920 (N.D. Ill. 1977).

However, such is not the case with OSHA regulations for the enabling legislation pertaining to OSHA specifically states that OSHA's regulations shall not supersede state laws. See, 29 U.S.C. §653(4). Indeed, it has repeatedly been held that OSHA's regulations do not preempt state laws pertaining to workplace hazards, including construction work. Manufacturers Ass'n. of Tri County v. Knepper, 801 F.2d 130 (3rd Cir. 1986), cert. denied, 108 S.Ct. 66, 484 U.S. 815 (1986); West Virginia Mfrs. Ass'n. v. State of W.Va., 714 F.2d 308 (C.A.W.Va. 1983); Berardi v. Getty Refining & Mktg. Co., 435 N.Y.S.2d 212, 107 Misc. 2d 541 (1980).

Thus, by ceding jurisdication over bridge working conditions to OSHA, the FRA will actually be also inviting state regulation over the same working conditions because OSHA jurisdiction is not exclusive. Such a development would not only prove unduly burdensome to the railroad industry, but it would also be directly contrary to the clear Congressional intent in passing FRSA, which was to establish a "uniform body of regulations and enforcement." H.R. Rep. No. 1194, 91st Cong., 2d Sess., reprinted in the U.S. Code Cong. & Admin. News 4104, 4111 (1970).

4. It would not be in the best interests of employee safety to adopt OSHA's protective equipment regulations as they are written because Section 1926.105 has been declared to be unconstitutionally vague and uncertain by both the Fifth and Eighth Circuit Courts of Appeal in Brennan v. Occupational Safety & Health Rev. Comm'n., 488 F.2d 337, 338-39 (5th Cir. 1973) and in Brennan v. Occupational Safety & Health Rev. Comm'n., 513 F.2d 713, 716 (8th Cir. 1975).

Perpetuating such poor draftsmanship would not serve anyone's interests and might subject the Secretary of Transportation and FRA to justifiable criticism.

5. At a time when the application and scope of the FELA, itself, is under reconsideration it would be terribly inappropriate to render it even more harsh and punitive by absorbing OSHA's ambiguous industrial regulations pertaining to working at heights within the scope of the FELA through FRA decree.

In Pratico v. Portland Terminal Co., 783 F.2d 255 (1st Cir. 1985) the Court of Appeals held that in those instances where OSHA regulations do apply to the railroad industry, their effect as a safety regulation is to strip the railroad of the defense of contributory negligence under the Federal Employer's Liability Act and to render railroads absolutely liable to an injured employee for on the job accidents.

As the dissenting judge wrote in Practico:

> "This court strips the railroad of a customary defense in mitigation of damages -- contributory negligence -- by construing against it an ambiguous regulation over which the Secretary of Labor, who has not spoken, has primary jurisdiction. I do not think that Congress, when it enacted 45 U.S.C. §53 intended to remove the consequences of a plaintiff's own contributory negligence in such slippery circumstances."
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> Practico at p. 270.

Certainly the FRA, who has the specific authority to regulate the railroad industry, should not act to place the railroad industry further out on such a "slippery" slope by broadening OSHA's jurisdiction over the railroad industry.

6. As observed in Practico, OSHA's jurisdiction is intended to cover all American industry that is not otherwise regulated and the language found in its regulations is therefore broad and ambiguous. Such inexact regulation will not serve the best interests of railroad management or labor and should be avoided.

If OSHA is to regulate personal protective equipment, the opportunity for misunderstandings and delays between regulator and regulated greatly increase. With much of American industry to regulate, will OSHA effectively find time to consider or be willing to allow necessary clarifications or amendments for the railroad industry? Presumably the railroad industry would not be allowed a clarification if, in so doing, an ambiguity in the regulation would then be created for the petrochemical industry or the steel industry. Such delays, misunderstandings and misinterpretations should not be risked, particularly in the important area of employee safety. FRA clearly understands the workings of the railroad industry and has the authority to act.

7. Finally, it seems clear that public policy dictates that the railroad industry not be subjected to dual regulation if it may be avoided for only inefficiency and ambiguity can result.

For example, if both FRA and OSHA are to have jurisdiction over bridge working conditions, the federal government will have to pay for dual inspections during track work involving bridges and the railroads will have to be responsive to same. Dual record keeping for the same track project would also result. And who will resolve the "grey areas" of overlapping jurisdiction, while the industry suffers from needless ambiguity? Again, the attendant risks of delay, misunderstanding and misinterpretation should be considered. Particularly here where issues of employee safety are at stake and the FRA clearly understands the workings of the industry and has the authority to act.

I trust this response has not been too lengthy, but C&NW's Engineering and Law Departments are greatly troubled by the mere suggestion that the FRA may be considering conceding its jurisdiction to OSHA in this important area. We certainly did not want the depth of C&NW's concern to be misunderstood or unappreciated. We thank you for the opportunity to address you on this matter. I trust that you will share C&NW's thoughts and

opposition to the OSHA proposal with the appropriate personnel within the FRA and the Department of Transportation.

Sincerely yours,

James P. Daley
Senior Vice President Law,
General Counsel and Secretary

cc: R. H. McDonald
Vice President - Engineering

W. H. Dempsey
President, AAR